# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 227.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

HENRY C. SMITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED JANUARY 15, 1898.

(16,778.)



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1 (*Petition for Certiorari.*)

STATE OF MICHIGAN:

To the justices of the supreme court:

Your petitioner, The Lake Shore and Michigan Southern Railway Company, a corporation, respectfully represents that heretofore, to wit, on the 20th day of October, 1893, Henry C. Smith, as petitioner and relator, filed in the circuit court for the county of Lenawee, in the State of Michigan, a petition, duly verified, which petition, among other things, alleged that under subdivision 9 of section 9 of article 2 of the General Railroad Laws of the State of Michigan, as amended by act No. 90 of the public acts of 1891, it became and was the duty of said railway company to keep for sale at its ticket office, in the city of Adrian, in said county of Lenawee, one-thousand mile tickets, at a price not to exceed twenty dollars, and required by the purchaser to issue such tickets in the name of the purchaser and his wife, designating the name of each on the ticket, subject to the limitations and conditions in said act mentioned, which tickets should be valid for two years after the date of purchase.

And the said petition further alleged that on the 19th day of April, 1893, and also on the 17th day of October, 1893, said Henry C. Smith, petitioner as aforesaid, tendered to the agent of said company in charge of its ticket office, in the said city of Adrian, the sum of twenty dollars, and demanded that said agent issue to him, said petitioner, a one-thousand-mile ticket, in the name of himself and his wife, Emma Watts Smith, as provided by the said statute; but that said agent, on both of said occasions, refused to sell to or issue to said Henry C. Smith such ticket in the name of himself and of his wife.

And the said petitioner therefore prayed that a mandamus issue, directed to said railway company, commanding it to issue or cause to be issued to him, the said petitioner, Henry C. Smith, on payment or tender of said sum of twenty dollars, such one-thousand-mile ticket, in the name of himself and his said wife, as re-
2 quired by the said statute. A duly authenticated copy of which petition is hereto annexed, marked "Exhibit A," and is made a part of this petition.

And your petitioner further shows that thereupon, to wit, on the said 20th day of October, 1893, the Honorable Victor H. Lane, circuit judge, then presiding, made an *ex parte* order that the said Lake Shore and Michigan Southern Railway Company issue to said Henry C. Smith and his wife, Emma Watts Smith, upon payment or tender to it or to its ticket agent in charge of its ticket office at Adrian, Michigan, of twenty dollars, a one-thousand mile ticket, valid for two years, in the name of said petitioner and his said wife, and that the same be issued on or before October 30th, 1893, or show cause on said date at the opening of court why it should not, and that a

copy of the order and that the petition be served upon the respondent, the said Lake Shore and Michigan Southern Railway Company, at least four days before said October 30th, as will more fully appear by the duly authenticated copy of said order hereto annexed and marked "Exhibit B" and made a part of this petition.

And your petitioner further shows that by consent of the parties the answer and return of respondent, The Lake Shore and Michigan Southern Railway Company, was not made and filed until the 20th day of November, 1893; that upon said 20th day of November, 1893, the respondent in said cause, said Lake Shore and Michigan Southern Railway Company, made answer and return to said order so as aforesaid made by the said circuit judge on the said 20th day of October, 1893, a duly authenticated copy of which answer and return is hereto annexed, marked "Exhibit C," and made a part of this petition; and thereafter, on the 27th day of November, 1893, the said relator filed in said cause a disclaimer or statement that he only asked that respondent be required to comply with the said statute in the lower peninsula of the State of Michigan, and not in any other State or Territory, copy of which disclaimer is hereto attached, marked "Exhibit D," and made a part of this petition.

3 And your petitioner further shows that the hearing of said petition was by consent of parties adjourned from time to time and the hearing thereon had before the said circuit judge on the 16th day of November, 1895, when the matter was submitted to said circuit judge, and on the 4th day of April, 1896, said circuit judge announced his decision and made an order therein that a writ of mandamus issue, directed to said respondent, the said Lake Shore and Michigan Southern Railway Company, commanding it to issue to said relator, said Henry C. Smith, upon payment or tender to it or to its ticket agent in charge of its ticket office at Adrian, Michigan, twenty dollars, lawful money of the United States, a thousand-mile ticket in the name of said Henry C. Smith and his said wife, Emma Watts Smith, as required by the act of the legislature of the State of Michigan mentioned in the petition, subdivision 9, section 9, article 2, chapter 91, of Howell's Annotated Statutes, as amended by act No. 90 of the public acts of 1891; that said ticket should be good upon and limited to the railway lines operated by the said respondent in the State of Michigan; a duly authenticated copy of which order is hereto annexed, marked "Exhibit D," and made a part of this petition.

And in the said order is also embraced the following:

"And it is further certified that upon the argument of said cause the question of a demand upon respondent by relator for a ticket limited to its lines within the State of Michigan was expressly waived by counsel for respondent, and it was agreed that the cause should proceed the same as if such demand had been made and refused."

And your petitioner avers that this latter certification is made under a misapprehension or mistake.

The waiver did not involve the question of a demand limited to the State of Michigan.

The waiver made by counsel for respondent upon the argument was as to the matter stated in the eighth paragraph of the answer and returned of respondent (Exhibit C); which eighth para-
4 graph is as follows:

"8. This respondent alleges that at no time since the making of the order to show cause herein down to the 13th day of November, 1893, has the petitioner, Henry C. Smith, or any person on his behalf, paid or tendered to said respondent's ticket agent in charge of its ticket office at Adrian, Michigan, twenty dollars or any other sum, nor has said Smith or any person upon his behalf requested this respondent to issue to him a thousand-mile ticket in accordance with the terms of said order."

It appears by the return of respondent to relator's petition that your petitioner owns and operates a line of railway from the city of Buffalo, in the State of New York, to the city of Chicago, in the State of Illinois, passing through the States of New York, Pennsylvania, Ohio, Indiana, and Illinois, and also a line of road that extends from Elkhart, in the State of Indiana, where it connects with said road between Buffalo and Chicago, to the city of Monroe, in the State of Michigan, with a branch line from Lenawee Junction, a station on said line, in the county of Lenawee and State of Michigan, to the city of Jackson, in the county of Jackson and State of Michigan; that said city of Adrian in said petition and answer named is a station on said line of road in said Lenawee county; that the most westerly station in the State of Michigan on said line of railroad is White Pigeon, and the said line of road crosses the State line between Indiana and Michigan 4.02 miles westerly from said station of White Pigeon.

And your petitioner further shows and alleges, and as is more fully stated in said answer and return, that all of said railroad line owned by your petitioner, including said Jackson branch, which is situated in the State of Michigan, was formerly the railroad belonging to the Michigan Southern Railroad Company, a corporation organized and existing under and by virtue of a special charter granted to said corporation by the State of Michigan by act No. 113 of the Session Laws of the State of Michigan for the Year 1846, approved May 9th, 1846.

5 And your petitioner further alleges, as it did in said answer and return, that it has succeeded to all the rights, franchises, and powers of said Michigan Southern Railroad Company under said charter.

And your petitioner further shows and alleges that under and by virtue of the terms and conditions of said charter the Michigan Southern Railroad Company had the power and authority to fix and charge, and did fix and charge, the sum of three cents per mile for transportation of passengers over its road, and the same right to charge three cents per mile has ever since been maintained and paid over the line of railroad authorized to be constructed by said charter.

And your petitioner alleges, as in said answer and return, that it has had and still has the power and authority to make such charge,

and that the provisions of said charter are now in full force and effect and apply to your petitioner and to that portion of its railroad so formerly held and owned by said Michigan Southern Railroad Company.

Your petitioner, the respondent in said proceedings named, alleges that the said order and direction of said circuit judge so made on the 4th day of April, 1896, that a writ of mandamus issue, as in said order directed, was and is unauthorized, and that the said court erred in making said order and in directing the issue of a writ of mandamus, for the following reasons:

1. The statute upon which the relator bases his right is too vague and indefinite to permit of enforcement by writ of mandamus.

2. It in general terms requires all railroad companies owning and operating railroads in the State of Michigan or partly in the State to keep on sale and sell one-thousand-mile tickets.

3. It does not declare or define what a one-thousand-mile ticket is or shall be.

4. The statute provides no means whereby the conductor of a train can identify the parties offering the ticket for passage
6 as the persons entitled to ride upon it.

5. It appearing by the petition and answer of respondent that the lines of road that respondent operates are partly within and partly without the State, the greater share of respondent's mileage being without the State of Michigan, the statute, if it applies or is intended to apply to transportation over respondent's road outside the State of Michigan, is unconstitutional and invalid under the Constitution of the United States, article 1, section 8, as an interference with interstate commerce.

6. It appears from the petition that the demand of relator for such one-thousand-mile ticket was intended and understood to be a demand for a ticket good anywhere on the lines of road operated by respondent, as well without as within the State of Michigan.

7. The act in question is an attempt on the part of the legislature to compel railroad companies to enter into express contracts to be performed in the future at any time within two years, at the option of the other party to the contract, and is therefore unconstitutional and invalid.

8. The act is so indefinite, uncertain, and imperfect in its terms and conditions that it is ineffectual and inoperative and its enforcement impracticable.

9. The use to which the ticket may be put is not stated, whether it shall be used for continuous journeys or with stop-over privileges.

10. The act requires all railroad companies in the State to keep for sale thousand-mile tickets, but whether they shall be good on all roads or upon some or any it does not define.

11. The act does not define whether all companies shall keep for sale such tickets for each and every road or only for its own road.

12. The statute does not define the rights or duties of the company or passenger under such mileage tickets.

13. The statute does not define whether such tickets shall be received on all or only on some passenger trains.

7 14. The statute does not define whether or not such tickets shall be received in payment of fare on what are known as "limited" trains and on such trains as, according to the rules and usages of railroad companies, mileage books are not received as fare.

15. The statute does not define whether or not trains shall be stopped at any station where a ticket-holder may desire to stop, though the train may be scheduled to not stop at that station.

16. There is no provision in the statute requiring any railroad company to accept or receive upon its passenger trains such mileage tickets.

17. The act in question is in violation of the provision of article 14 of the amendment to the Constitution of the United States, that no person shall be deprived of property without due process of law.

18. The act attempts to compel railroad companies to agree to part with their property, to wit, transportation, at a fixed rate at a date in the future when such fixed rate may be wholly unremunerative and at a time when a greater rate may be authorized and allowed by law.

19. The statute in question is void and not within the constitutional power of the legislature.

20. The statute in question is in violation of that provision of the constitution of the State of Michigan that gives to the legislature power to from time to time "establish reasonable maximum rates for the transportation of passengers and freight on the different railroads in this State."

21. That the relator filed a disclaimer as to his right to such a ticket good outside the lower peninsula, in the State of Michigan, does not entitled him to a ticket good in the lower peninsula, even if otherwise entitled thereto. If his petition is too broad and asks more than he is entitled to he cannot so amend it.

22. The court erred in directing a mandamus to issue for a ticket differing from that asked for by the petition and designated in the order to show cause.

23. The act in question does not apply to your petitioner, 8 The Lake Shore and Michigan Southern Railway Company. It applies only to such corporations as are organized under the general railroad laws of the State.

24. Your petitioner herein owns and operates its line of road through Adrian, where relator resides and where demand was made for such ticket by relator, and its line of road from Monroe to Elkhart and from Lenawee Junction to Jackson, under the special charter granted by the legislature of the State of Michigan to the Michigan Southern Railroad Company to all the rights and privileges *of* which your petitioner has succeeded, including the right to charge three cents per mile for passenger transportation.

25. This special charter was and is in the nature of a contract between the State and the Michigan Southern Railroad Company, and now between the State and your petitioner. It was a bargain and sale of the road belonging to the State to the Michigan Southern Railroad Company for a consideration paid.

26. It is not within the power of the legislature to change the

terms and conditions of the said charter and contract other than in the manner in said charter provided.

27. Nor is it within the power of the legislature to reduce the rate of fare that respondent may charge below three cents per mile.

Wherefore your petitioner prays that a writ of certiorari may be issued out of and under the seal of the supreme court of the State of Michigan to review said proceedings before the said circuit judge in said circuit court for the county of Lenawee, and that the said order directing a mandamus to issue be set aside, and that a writ of mandamus as prayed for by the relator be denied.

And your petitioner prays that the same be made a calendar cause.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,
By C. E. WEAVER, *Its Agent and Attorney.*

9 ASHLEY POND,
A. C. ANGELL AND
C. E. WEAVER,
*Attorneys for Petitioner.*
GEO. C. GREENE, *Of Counsel.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Lenawee.

HENRY C. SMITH, Petitioner and Relator,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

LENAWEE COUNTY, *ss:*

Clement E. Weaver, being duly sworn, deposes and says that he resides in the city of Adrian, in said county of Lenawee, and that he is now and for several years last past has been the agent and attorney of The Lake Shore and Michigan Southern Railway Company, the respondent in the above-entitled cause; that he is the agent and attorney of said respondent in this cause, and makes this affidavit and verification of the foregoing petition of respondent for a writ of certiorari on this cause for and in behalf of said petitioner, which petition is made a part of this affidavit; that he has full and particular knowledge of all the matters stated in the foregoing petition; that he has read the foregoing petition; that he knows the contents of said petition, and that the same is true of his own knowledge as therein stated except as to those matters therein stated to be
10 upon information and belief, and as to those matters he believes it to be true.

CLEMENT E. WEAVER.

Sworn to and subscribed before me this 2nd day of May, 1896.
D. B. MORGAN,
*Notary Public in and for Lenawee County.*

11 "EXHIBIT A."

STATE OF MICHIGAN:

To the circuit court for the county of Lenawee:

The petition of Henry C. Smith, of the city of Adrian, county of Lenawee, State of Michigan, shows:

1. That the Lake Shore and Michigan Southern Railway Company is and was on, to wit, the 19th day of April last, and for a long time prior thereto has been, a private corporation duly organized and doing business under the laws of the State of Michigan, partly in this State and partly in the States of New York, Ohio, Indiana, and Illinois, and as such operating a railroad in said States, except the upper peninsula of the State of Michigan, for the transportation and carriage of persons and freight, and that one of the principal ticket offices of said railway company upon its line of roads is at the said city of Adrian.

2. That under subdivision 9 of section 9 of article II of the general railroad laws of this State, as amended by act No. 90 of the public acts of 1891, it became and was the duty of the said railway company to keep for sale at its ticket office in said city of Adrian one-thousand-mile tickets at a price not to exceed twenty dollars, and it also became and was the duty of said company, if required by the purchaser, to issue such tickets in the name of such purchaser and his wife, designating the name of each on such tickets, subject to the limitations and conditions in said act mentioned, which tickets shall be valid for two years after date of purchase.

3. That for several years said railroad company has kept and now keeps for sale at its said office in said city of Adrian one thousand-mile tickets at the price of $20.00, but said tickets when issued by it were and are made non-transferrable and subject to certain conditions endorsed thereon, No. 1 of which is as follows: That it shall be good only for and when properly signed by the person in whose name it is issued, and it shall be taken up and forfeited if
12 presented by any other person; not transferable. And No. 8 is as follows: Passage shall not be claimed after the expiration of the limit of this contract, not exceeding one year, as this ticket and contract shall be surrendered to the conductor when expired or when the last mile is taken.

4. That on, to wit, the 19th day of April last, and also on October 17th, 1893, your petitioner tendered to the agent of said railway company in charge of its ticket office at said city of Adrian the sum of twenty dollars and demanded that said agent issue to your petitioner a one-thousand-mile ticket in the name of your petitioner and of his wife, Emma Watts Smith, as provided by the above-mentioned statute; that said agent offered to sell your petitioner such one-thousand-mile ticket issued in his individual name and made non-transferable, but did refuse on both of said occasions and still does refuse to issue such ticket in the name of your petitioner and of his wife; further shows that many persons desire to pur-

chase similar tickets, and that said matter is of general importance to the public.

Therefore your petitioner prays that a mandamus do issue directed to said railway company, commanding it to issue or cause to be issued to your petitioner, on payment or tender of said sum of twenty dollars, such one-thousand-mile ticket in the name of your petitioner and of his said wife, as required by the act above mentioned.

HENRY C. SMITH.

WATTS, BEAN & SMITH,
*Attorneys for Petitioner.*

STATE OF MICHIGAN, } ss:
*County of Lenawee,* }

Henry C. Smith, being duly sworn, says that he has read the foregoing petition by him subscribed and knows its contents, and that the facts therein stated are true of his knowledge.

13 Subscribed and sworn to before me this 18th day of October, 1893.

CHANNING WHITNEY,
*Notary Public.*

STATE OF MICHIGAN, } ss:
*County of Lenawee,* }

I, Edwin L. Mills, clerk of the county of Lenawee and of the circuit court thereof, the same being a court of record and having a seal, do hereby certify that I have compared the foregoing copy of petition with the original as filed October 20th, 1893, now remaining in my office, and have found the said copy a correct transcript therefrom and of the whole thereof.

Seal Lenawee Circuit Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this second day of May, A. D. 1896.

EDWIN L. MILLS, *Clerk.*

14 "EXHIBIT B."

STATE OF MICHIGAN:

The Circuit Court for the County of Lenawee.

HENRY C. SMITH, Petitioner,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

At a session of said court held at the court-house, in the city of Adrian, in said county, on the 20th day of October, 1893.

Present: Hon. Victor H. Lane, circuit judge.

The matter of the petition of Henry C. Smith, asking that a mandamus issue against the Lake Shore and Michigan Southern Railway Company, as prayed in said petition, came on to be heard.

After hearing Watts, Bean & Smith, attorneys for petitioner, and reading the said petition on file, and being fully advised in the premises, it is ordered that the said respondent, The Lake Shore and Michigan Southern Railway Company, do issue to said Henry C. Smith and his wife, Emma Watts Smith, upon the payment or tender to it or to its ticket agent in charge of its ticket office at Adrian, Michigan, of twenty dollars, a one-thousand-mile ticket, valid for two years, in the name of said petitioner and his said wife, and that the same be issued on or before October 30th, 1893, or show cause on said date at the opening of said court why it should not.

And that a copy of this order and of said petition be served upon said respondent at least four days before said October 30th.

VICTOR H. LANE,
*Circuit Judge.*

15 STATE OF MICHIGAN, } ss:
*County of Lenawee,* }

I, Edwin L. Mills, clerk of the county of Lenawee and of the circuit court thereof, the same being a court of record and having a seal, do hereby certify that I have compared the foregoing copy of order with the original as made October 20th, 1893, now remaining in my office, and have found the said copy a correct transcript therefrom and of the whole thereof.

Seal Lenawee Circuit Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this second day of May, A. D. 1896.

EDWIN L. MILLS, *Clerk.*

16 "EXHIBIT C."

STATE OF MICHIGAN:

In the Circuit Court for the County of Lenawee.

HENRY C. SMITH, Relator,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

The answer and return of The Lake Shore and Michigan Southern Railway Company, respondent, to the order to show cause why it should not sell and issue to petitioner a one-thousand-mile passenger ticket, good for himself and wife and in the name of himself and wife, Emma Watts Smith, good for two years from the issue thereof.

Now comes the respondent, and for answer thereto says:

1. That this respondent, The Lake Shore and Michigan Southern Railway Company, is a railroad corporation owning and operating a railroad between Chicago, in the State of Illinois, and Buffalo, in the State of New York, which passes through and into the States of Illinois, Indiana, Ohio, Pennsylvania, and New York, and also a

line of railroad which extends from said first-mentioned railroad at Elkhart, in the State of Indiana, to Monroe, in the State of Michigan, with a branch line from Lenawee Junction, on said line, a station in the county of Lenawee, in the State of Michigan, to the city of Jackson, in the county of Jackson, in said State.

2. That the most westerly station in the State of Michigan on the said line of railroad extending from Elkhart to Monroe is White Pigeon; that said line of road extending from Monroe to Elkhart crosses the State line into Indiana about 4.02 miles westerly from the said station of White Pigeon.

3. That all of the said railroad line owned by this respondent, including said Jackson branch, which is situated in the State of Michigan as aforesaid, was formerly the railroad belonging
17 to the Michigan Southern Railroad Company, a corporation organized and existing under and by virtue of a special charter granted to said corporation by the State of Michigan by act No. 113 of the Session Laws of Michigan for the Year 1846, approved May 9, 1846.

4. That the said Michigan Southern Railroad Company, under an act of the legislature of the State of Michigan in that behalf, became consolidated with a corporation of the State of Indiana known as the Northern Indiana Railroad Company, which then owned and operated a line of railroad from the Michigan and Indiana State line to the city of Chicago, in the State of Illinois, thereby forming the Michigan Southern and Northern Indiana Railroad Company, which said company then succeeded to all the rights, franchises, property, and powers of the said Michigan Southern Railroad Company.

5. And the said Michigan Southern and Northern Indiana Railroad Company afterwards, under due legislative authority in that behalf, entered into consolidation with certain other railroad companies organized under the laws of Illinois, Ohio, Pennsylvania, and New York respectively, and thereby formed the said respondent, The Lake Shore and Michigan Southern Railway Company, and this respondent thereby acquired all rights, franchises, powers, and property of said Michigan Southern Railroad Company and of the said Michigan Southern and Northern Indiana Railroad Company, and holds and is entitled to all the rights, franchises, powers, and privileges granted in and by the charter aforesaid and by the acts of the legislature of said State to said Michigan Southern Railroad Company and the said Michigan Southern and Northern Indiana Railroad Company.

6. That under and by virtue of the said charter of the Michigan Southern Railroad Company to it all the rights, franchises, and powers of which respondent has succeeded the said Michigan Southern Railway Company had the power and authority to charge and did charge and fix the rate for the transportation of passengers over its said railroad at three cents per mile. The said rate and charge
18 of three cents per mile has ever since been maintained, charged, and paid over the lines of railroad so authorized by the said charter to be constructed by the said Michigan Southern

Railroad Company, the Michigan Southern and Northern Indiana Railroad Company, and this respondent, and respondent has had and still has the power and authority to make such charge; that the said provisions of said charter are now in full force and effect and apply to respondent and to that portion of its railroad so formerly held and owned by said Michigan Southern Railroad Company.

7. That said Adrian Station, referred to in the petition in this case, is a station of respondent situated in the county of Lenawee, in the State of Michigan, on the said line of railroad extending from Monroe to White Pigeon, so formerly owned by the said Michigan Southern Railroad Company; that none of the other said lines of railroad so as aforesaid operated by this respondent reach the city of Adrian, nor is the said city of Adrian a station upon any line of respondent's road other than the said road so formerly owned by said Michigan Southern Railroad Company, and the ticket office mentioned in said petition was and is the ticket office of said respondent upon said road so as aforesaid heretofore owned by the Michigan Southern Railroad Company, and from the petition in this cause it appears, and must have been so intended and understood, that the demand made by petitioner for a one-thousand-mile ticket was a demand for a ticket which should entitle the petitioner and his wife to transportation to and from the said city of Adrian and over the whole line of respondent's road, both in and out of the State.

8. This respondent alleges that at no time since the making of the order to show cause herein down to the 13th day of November, 1893, has the said petitioner, Henry C. Smith, or any person on his behalf paid or tendered to said respondent's ticket agent in charge of its ticket office at Adrian, Michigan, twenty dollars or any other sum, nor has said Smith or any person upon his behalf requested this respondent to issue to him a thousand-mile ticket in accordance with the terms of said order.

19 9. And this respondent is advised and submits that the provisions of the act of the legislature of 1891 referred to and quoted in this petition have no application to that portion of this respondent's line of railroad so formerly owned by the Michigan Southern Railroad Company; that said act of 1891 has no application and can have no application to this respondent and its lines of road outside the State of Michigan.

10. And this respondent is advised and shows and submits that if said act of the legislature of Michigan mentioned in said petition is held and construed to require this respondent to issue a thousand-mile ticket, in accordance with its terms, good upon the lines of road operated by it outside the said State of Michigan, it is in effect a regulation of interstate commerce and in violation of the provision of article I, section VIII, of the Constitution of the United States, which confers upon Congress the power to regulate commerce between the States.

11. And this respondent submits that said act is so uncertain and

indefinite in its terms and provisions that it is impracticable of construction or enforcement.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY,
By JOHN NEWELL, *President.*

ASHLEY POND AND
C. E. WEAVER,
*Attorneys for Respondent.*
GEO. C. GREENE, *Of Counsel.*

20 STATE OF MICHIGAN:

In the Circuit Court for the County of Lenawee.

HENRY C. SMITH, Petitioner and Relator,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

LENAWEE COUNTY, *ss:*

Clement E. Weaver, being duly sworn, deposes and says that he resides at the city of Adrian, in said county, and that he is now and for several years last past has been the agent and attorney of The Lake Shore and Michigan Southern Railway Company, the foregoing and above-named respondent; that he is the agent and attorney of said respondent in this cause and makes this affidavit and verification of the foregoing answer and return for and in behalf of said respondent, which said answer and return is made a part hereof; that he has full and particular knowledge of all the matters stated in said answer and return; that he has read the said answer and return and knows the contents thereof, and that the same is true of his own knowledge as therein stated, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

CLEMENT E. WEAVER.

Sworn to and subscribed before me this 20th day of November, A. D. 1893.

SETH BEAN,
*Notary Public in and for Lenawee County, Mich.*

21 STATE OF MICHIGAN, *County of Lenawee,* } *ss:*

I, Edwin L. Mills, clerk of the county of Lenawee and of the circuit court thereof, the same being a court of record and having a seal, do hereby certify that I have compared the foregoing copy of answer with the original as filed November 20, 1893, now remaining in my office, and have found the said copy a correct transcript therefrom and of the whole thereof.

Seal Lenawee Circuit Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this second day of May, A. D. 1896.

EDWIN L. MILLS, *Clerk.*

22 "EXHIBIT D."

STATE OF MICHIGAN:

In the Circuit Court for the County of Lenawee.

HENRY C. SMITH, Relator,
*vs.*
LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

Now comes Henry C. Smith, the above-named relator, and, in reply to the answer of the above-named respondent showing cause in said matter, states that he does not understand and does not claim that the statute under which his petition is filed regulates the rate of charge or the kind of ticket respondents shall have or use outside of the lower peninsula of the State of Michigan, and he only asks in said matter that respondent be required to comply with said statute in the lower peninsula of the State of Michigan, and not in any other State or Territory.

Dated November 27, 1893.

HENRY C. SMITH.

WATTS, BEAN & SMITH,
*Attorneys for Relator.*

23 STATE OF MICHIGAN, } *ss:*
*County of Lenawee,* }

I, Edwin L. Mills, clerk of the county of Lenawee and of the circuit court thereof, the same being a court of record and having a seal, do hereby certify that I have compared the foregoing copy of disclaimer with the original as filed November 27th, 1893, now remaining in my office, and have found the said copy a correct transcript therefrom and of the whole thereof.

Seal Lenawee Circuit Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this second day of May, A. D. 1896.

EDWIN L. MILLS, *Clerk.*

24 "EXHIBIT E."

STATE OF MICHIGAN:

In the Circuit Court for the County of Lenawee.

HENRY C. SMITH, Relator,
*vs.*
LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

At a session of said court held in the court-house, in the city of Adrian, in said county, on the fourth day of April, A. D. 1896.

Present: Honorable Victor H. Lane, circuit judge.

In pursuance of an order made October 20th, 1893, that respondent show cause why it should not issue to said Henry C. Smith and his wife, Emma Watts Smith, a thousand-mile ticket, this matter came on to be heard, and after hearing Watts, Bean & Smith and Fred A. Maynard, attorney general, for the relator, and C. E. Weaver, Ashley Pond, and George C. Greene, for the respondent, after due deliberation had thereon, it is by the court now ordered, adjudged, and decreed that a writ of mandamus do issue, directed to the said respondent, The Lake Shore and Michigan Southern Railway Company, commanding it to issue to said relator, upon payment or tender to it or to its ticket agent in charge of its ticket office at Adrian, Michigan, of twenty dollars, lawful money of the United States, a thousand-mile ticket in the name of said Henry C. Smith and his said wife, as required by the act of the legislature of the State of Michigan mentioned in the petition herein, being subdivision 9 of section 9 of article 2 of chapter 91 of Howell's Annotated Statutes, as amended by act No. 90 of the public acts of 1891; that said
25 ticket shall be good upon and limited to the railway lines operated by respondent within the State of Michigan.

The court orders it to be certified and made a part of the record in this case and of the order and decree granted herein that in the decision of this case and rendition of said order and decree it became and was necessary and material to the case to determine whether the act of the legislature of the State of Michigan mentioned in the petition herein, being subdivision 9 of section 9 of article II of the general railroad laws of the State, as amended by act No. 90 of the public acts of 1891, is in violation of or repugnant to article XIV of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and also whether said act of the legislature is in violation of or repugnant to the 8th section of article I of said Constitution, which declares that "The Congress shall have power * * * to regulate commerce * * * among the several States," and that the validity of said act was drawn in question on the ground of its being repugnant

to said Constitution, and the decision was and is in favor of its validity.

And it is further certified that upon the argument of said cause the question of a demand upon respondent by relator for a ticket limited to its lines within the State of Michigan was expressly waived by counsel for respondent, and it was agreed that the cause should proceed the same as if such demand had been made and refused.

(Signed) VICTOR H. LANE,
*Circuit Judge.*

26 STATE OF MICHIGAN, } ss:
*County of Lenawee,* }

I, Edwin L. Mills, clerk of the county of Lenawee and of the circuit court thereof, the same being a court of record and having a seal, do hereby certify that I have compared the foregoing copy of order of April 4, 1896, with the original as entered, now remaining in my office, and have found the said copy a correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this second day of May, A. D. 1896.

Seal Lenawee Circuit Court.

EDWIN L. MILLS, *Clerk.*

27 The foregoing petition for certiorari is endorsed:

Let a writ of certiorari issue as prayed. May 5, 1896. Chas. D. Long, chief justice. Filed May 5, 1896. Chas. C. Hopkins, clerk supreme court.

28 (*Writ of Certiorari.*)

In the name of the People of the State of Michigan to the judge of the circuit court for the county of Lenawee:

[Seal Supreme Court Michigan.]

We, being willing, for certain causes, that it should be certified to our supreme court what proceedings have been had before you and what has been done by you in the matter of granting a peremptory writ of mandamus in a cause pending in said circuit court wherein Henry C. Smith is relator and The Lake Shore & Michigan Southern Railway Company is respondent:

Do therefore command you that you distinctly and openly certify the records and proceedings in said matter to the said supreme court, before the justices thereof, that they may have them at the supreme court room, in the capitol, in the city of Lansing, on the twenty-fifth day of May, A. D. 1896, that said court may cause to be done thereupon what of right ought to be done, and have you then and there this writ.

Witness the Honorable Charles D. Long, chief justice of our supreme court, at Lansing, this fifth day of May, in the year of our Lord one thousand eight hundred and ninety-six.

CHAS. C. HOPKINS,
*Clerk Supreme Court.*

I hereby certify that the foregoing writ was duly allowed by Honorable Charles D. Long, chief justice of the supreme court of Michigan, on the fifth day of May, 1896.

CHAS. C. HOPKINS, *Clerk.*

[Seal Supreme Court Michigan.]

29 (*Return to Certiorari.*)

STATE OF MICHIGAN:

Supreme Court.

HENRY C. SMITH, Relator,
*vs.*
LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

To the supreme court of the State of Michigan:

The undersigned, judge of the circuit court for the county of Lenawee and State of Michigan, in response to the writ of certiorari issued in said cause May 5th, 1896, and to him directed, does hereby distinctly and openly certify the records and proceedings in said matter as follows:

1. Exhibit "A" attached to the petition for said writ is a copy of the petition of relator filed in said cause.

2. That on October 20th, 1893, an order was made in said cause, and that Exhibit "B" attached to the petition for said writ is a true copy thereof.

3. That Exhibit "C" attached to said petition is a copy of the answer of relator filed in said cause.

4. That on November 27th, 1893, relator filed a disclaimer or statement in said cause, and that Exhibit "D" is a true copy of the same.

5. That on April 4th, 1896, it was adjudged and determined that a writ of mandamus issue, and that Exhibit "E" attached to said petition is a copy of the order made; and further certifies and returns that on the hearing of said cause the point was made that no demand was made for the issuing of a ticket to relators pursuant to the requirement of the order, Exhibit "B" to relator's petition. After some discussion it was agreed in open court that the case might be heard and considered as though such demand had been made and respondent had declined to issue a ticket pursuant
30 to it. At this time relator's petition, respondent's answer, and relator's disclaimer were before the court. Respondent also claimed that relator's petition having demanded the right for a ticket over all respondent's lines, it was not within the power of the court to limit the ticket to the lines of Michigan. No definite language was used at the time the waiver was made which clearly defined the extent of the waiver. It was understood by the court, however, that relators were at that time only insisting upon their right to a ticket over the lines of respondent in Michigan, and the court understood that such a demand as would lay a foundation for

the issuing of a writ, as then insisted upon by relator, was waived, nor was any definite waiver of any other objection made by respondent at any time.

6. Further certifies and returns that it did appear by said answer, filed by respondent, and by admissions of respondent in open court, that it owned and operated a line of railroad from Buffalo, New York, to Chicago, Illinois, passing through New York, Pennsylvania, Ohio, Indiana, and Illinois, over what is known as its air line from Toledo, Ohio, to Elkhart, Indiana, and also extending from said Buffalo to said Chicago over its old line, which passes from said Toledo to said Adrian, Michigan, and thence to said Elkhart, and thence to said Chicago, and also a line of road extending from Monroe, Michigan, to Lenawee Junction, Michigan, and from said Lenawee Junction to Jackson, Michigan; that said city of Adrian was a station on the line of the said road in Lenawee county, Michigan; that the most westerly station in the State of Michigan on its said road was White Pigeon, and that said road crossed the State line between Indiana and Michigan 4.02 miles westerly from said White Pigeon; that all of said railroads were operated under one system and under the name of the Lake Shore and Michigan Southern Railway Company.

7. That it appeared from said answer and from admissions in open court and the map used in the argument that said road from Jackson to Lenawee Junction and from said Monroe to said
31 Elkhart, passing through the city of Adrian, was formerly the railroad of the Michigan Southern Railway Company, which company held a lease of the Erie & Kalamazoo Railway Company from Adrian to Toledo in perpetuity.

8. And it further appeared that said Michigan Southern Railway Company had no directors nor officers nor separate stockholders, and had not had since the consolidation of said Michigan Southern Railway Company with the Northern Indiana Railway Company, the Cleveland & Toledo, the Cleveland, Painsville & Ashtabula, and the Buffalo & Erie Railway Companies under the name of Lake Shore & Michigan Southern Railway Company.

9. And I held that respondent had not succeeded to the contract rights, franchise, and power of said Michigan Southern Railway Company under the charter of said company except as subject to the general railroad laws of this State, as to the lines operated by it in this State.

10. And I found that by the consolidation of said railway companies, operating under the name of Lake Shore & Michigan Southern Railway Company, that the Michigan Southern Railway Company surrendered its charter rights to charge three cents per mile, and that respondent does not have the power to charge three cents per mile for the transportation of passengers within this State except as authorized by the railroad laws of this State.

11. And I found that the said charter of the Michigan Southern Railway Company did not apply to relator, but that it is subject to the general railroad laws of this State as to the lines operated in this State.

In witness whereof I have hereunto set my hand this — day of May, A. D. 1896.

Respectfully submitted.

VICTOR H. LANE,
*Judge of the Circuit Court for the County of Lenawee.*

Endorsed: Filed May 13, 1896. Chas. C. Hopkins, clerk supreme court.

32 Office of Lenawee county clerk; E. L. Mills, clerk.

ADRIAN, MICH., *May* 18, 1896.

DEAR SIR: In the return to the writ of certiorari in case of Henry C. Smith *vs.* Lake Shore & Michigan Southern R'y Co., I have called attention of counsel to an amendment which I desire to make, and there is consent that I may suggest it to you, and ask you to write it in the return.

It is as follows: After the word "waived," in the latter part of paragraph "V" of the return, add the following: "nor was any definite waiver of any other objection made by respondent at any time."

If you will be kind enough to make this amendment I will be obliged to you.

Sincerely yours,

V. H. LANE,
*Circuit Judge.*

To Chas. C. Hopkins, clerk supreme court.

33 STATE OF MICHIGAN:

Supreme Court.

HENRY C. SMITH, Relator,
*vs.*
LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Appellant.

In this cause the return having been made before the return day, it is stipulated that the cause be placed upon the calendar for hearing at the next term of court, copy of writ having been served upon attorneys for relator, together with notice of hearing.

Dated May 19, 1896.

WATTS, BEAN & SMITH,
*Attorneys for Relator.*
ASHLEY POND,
A. C. ANGELL,
C. E. WEAVER,
*Attorneys for Respondent and Appellant.*

Endorsed: Filed May 21, 1896. Chas. C. Hopkins, clerk supreme court.

34 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the nineteenth day of June, in the year of our Lord one thousand eight hundred and ninety-*seven* six.

Present: The Honorable Charles D. Long, chief justice; Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, associate justices.

HENRY C. SMITH, Relator,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Defendant and Appellant.

This cause coming on to be heard is argued by Messrs. Maynard and Watts for the relator and by Mr. George C. Greene for the respondent and submitted.

35 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the first day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Charles D. Long, chief justice; Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, associate justices.

HENRY C. SMITH, Relator,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Appellant.

In this cause an opinion is filed, in accordance with which a judgment will be hereafter entered.

36 (*Opinion.*)

Supreme Court of Michigan.

HENRY C. SMITH, Relator,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

The relator applied to the respondent company for a one-thousand-mile mileage book, to be issued in the name of himself and wife, and was refused. He thereupon brought this proceeding in the circuit court to compel the respondent to issue such a ticket. The circuit judge granted an order that a ticket good upon the lines of the respondent in this State be issued, and this order is the one now under review.

The action is based upon the amendment to section nine of the railroad law adopted and embodied in act No. 90 of the public acts of 1891, which contains the following provisions:

"One-thousand-mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State, or carrying on business partly within and partly without the limits of this State, at a price not exceeding twenty dollars in the lower peninsula and twenty-five dollars on the upper peninsula. Such one-thousand-mile tickets may be made non-transferable, but, whenever required by the purchaser, they shall be issued in the name of the purchaser, his wife and children, designating the name of each on each ticket. * * * Each one thousand-mile ticket shall be valid for two years only after date of purchase."

In the same section of the statute it is provided that the rates of fare shall not exceed two cents a mile for carriage of passengers by railroads whose gross earnings are more than three thousand dollars per mile, two and a half for roads whose gross earnings are
37 more than two and less than three thousand dollars, and for companies whose earnings are less than two thousand dollars per mile three cents per mile, except in the upper peninsula, where a higher rate is permitted.

It is contended that there was error in the ruling below, and various grounds are alleged.

First. It is contended that the statute is an attempt on the part of the legislature to provide for the sale of mileage which shall be good outside of the State, and that as this affects interstate commerce it is unconstitutional.

Second. That the charter of the Michigan Southern Railway Company, passed in 1846, which provided that "it shall and may be lawful for said company from time to time to fix, regulate, and receive the dues and charges taken for transportation of property and persons on said railroad as aforesaid. * * * Provided, said company shall charge no greater sum for the transportation of persons and property than were charged or authorized by the State of Michigan to be taken by the Southern railroad on the first day of January last," is still in force, and, as it was granted prior to the amendment of the constitution reserving the right to alter or amend charters of corporations organized under the laws of the State, that the legislation in question impairs the obligation of contracts, within the doctrine of the Dartmouth College case, and is for this reason invalid.

Third. That, independently of this provision, the act is unconstitutional for the reason that it is an attempt to compel railroad companies to enter into contracts to be performed in the future at any time within two years, and is an invasion of the right to the use of property; and in the same connection it is contended that this is in violation of the fourteenth amendment of the Constitution of the United States, which provides that no person shall be deprived of property without due process of law.

Fourth. It is contended that the amendment to the constitution, article 19*a*, sec. 1, is a limitation upon the power of the legislature to legislate as to rates and charges of transportation, and
38 limits the right in that regard to the fixing of maximum rates, and that the provision for the issuing of a mileage

book is not a fixing of maximum rates of charge, but is a further regulation.

I. The first contention cannot be allowed for the reason that the statute, fairly construed, was intended to limit the use of the mileage ticket to the State of Michigan. It fixes the price of the ticket—not exceeding twenty dollars in the lower peninsula and twenty-five dollars in the upper peninsula. While the language is not very apt, we think it was the clear intention that a ticket, the price of which should be twenty dollars for one thousand miles of transportation, would be one entitling the purchaser to carriage in the lower peninsula of Michigan, and one at twenty-five dollars to carriage in the upper peninsula, and that it was not the intention by this reference to locality to fix the place where the tickets should be placed on sale. Thus construed, the statute cannot be held to be a regulation of interstate commerce.

II. The answer of respondent sets out that in 1846 a special charter, containing the provisions above quoted, was granted to the Michigan Southern Railroad Company; that subsequently the Michigan Southern Railroad Company, under an act of the legislature of the State of Michigan, became consolidated with a corporation of the State of Indiana known as the Northern Indiana Railroad Company, thereby forming the Michigan Southern & Northern Indiana Railroad Company, which company then succeeded to all the rights, franchises, property, and powers of the Michigan Southern Railroad Company; and that the Michigan Southern & Northern Indiana Railroad Company afterwards, under due legislative authority in that behalf, entered into consolidation with certain other railroad companies, organized under the laws of Indiana, Ohio, Pennsylvania, and New York, respectively, and thereby formed the said respondent, The Lake Shore and Michigan Southern Railway Company, and that this respondent thereby acquired all the rights, franchises, powers, and property of the Michigan Southern Railroad Company and the Michigan Southern & Northern Indiana Railroad Company, and holds and is entitled to all the rights, franchises, powers, and privileges granted in and by the charter aforesaid and by the acts of the legislature of the said State.

39 The last consolidation set up was under act No. 82 of the Laws of 1855, entitled "An act to provide for the incorporation of railroad companies."

Section 50 provides that "any railroad company in this State, forming a continuous or connected line with any other railroad company, may consolidate with such other company, either in or out of this State, into a single corporation. * * * Such new corporation shall possess all the powers, rights and franchises conferred upon such two or more corporations; and shall be subject to all the restrictions and perform all the duties imposed by the provisions of their respective charters or laws of organization, not inconsistent with the provisions of this act."

By section 52 it is provided that "upon the election of the first board of directors of the corporation created by said agreement, all

and singular the rights and franchises of each and all of said two or more corporations, parties to such agreement, all and singular their rights and interests in and to every species of property and things in action, shall be determined to be transferred to, and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with all the right of way and other property, in the same manner, and to the same intent as if the said two or more corporations, parties to such agreement, should have continued to retain the title and transact the business of such corporations."

It is contended by the defendant that under this statute, where a consolidation takes place of a corporation organized and existing under a special charter, as did the respondent company, with a corporation or corporations existing under the laws of another State, the effect is not to annihilate the previously existing Michigan corporation, but that upon the consolidation the original corporation brings to the new entity the powers and privileges already possessed, and that the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed and succeeds there to its privileges.

40 The learned counsel for respondent cites, as sustaining this view, State Treasurer *v.* Auditor General, 46 Mich., 224; Chicago & Northwestern Railway Co. *v.* Auditor General, 53 Mich., 79; Nashua & Lowell R. R. Co. *v.* Boston & Lowell R. R. Co., 136 U. S., 356; People *v.* Railway Co., 129 N. Y. 474.

Passing the consideration of these cases for the time and having reference to the terms of the act under which the consolidation took place, it is to be observed that this act constituted the consolidated entity a new corporation, if we regard the terms employed in the statute, both in section 50, above quoted, which limits the rights and franchises derived from the old corporation and to be exercised by the new to such as are not inconsistent with the provisions of the act, and in section 52, relied upon by respondent, as well the new creation is referred to as "such new corporation." It is also a corporation created under a general law. At the time of its creation section 1 of article XV of the constitution provided that corporations might be formed under general laws, and that "all laws passed pursuant to this section of the constitution may be amended, altered, or repealed."

It was said in Muller *v.* Dows, 94 U. S., 444, of such a corporation so formed: "The two companies became one, but in the State of Iowa that one was an Iowa corporation, existing under the laws of that State alone."

In State Treasurer *v.* Auditor General, 46 Mich., 224, and Chicago & Northwestern R'y Co. *v.* Auditor General, 53 Mich., 79, the question was as to what portion of the earnings of the consolidated company were subject to taxation in this State.

In State Treasurer *v.* Auditor General it was held that the Lake Shore & Michigan Southern railway was not a corporation formed under the general railroad law within the meaning of the clause of the statute providing for taxing railroad companies so formed.

In Chicago & Northwestern Railway Co. *v.* Auditor General the same doctrine was held.

It was said in the latter case: "We appreciate very fully
41 the difficulty of determining under all circumstances in what light we are to regard the anomalous organizations which are formed by the consolidation of two or more corporations which have received their corporate powers from different sovereignties." The case of Peik *v.* Railway Company, 94 U. S., 164, was cited with approval. In that case it was held that the State in which the road lay may legislate for the consolidated company in that State precisely as before the consolidation.

Neither of the two Michigan decisions determined what legislative control the legislature of the State has over that portion of the road which lies within the State, or as to the conduct of business within the State.

And this may also be said of People *v.* Railway Company, 129 N. Y., 474.

The companies at present forming the respondent derived rights under the law permitting a consolidation, and, while there may be difficulty in subjecting so much of the property of the consolidated company as lies without the State to our jurisdiction or in controlling the transactions of the corporation itself without the State or in fixing taxation upon a basis which rests upon its earnings outside the State it is not apparent why the company as to its exercise of corporate functions within the State is not subject to the terms of the act authorizing its consolidation, as limited by the constitutional provision in force at the time, or why it is not subject to local legislation.

Counsel also cite the case of Tomlinson *v.* Branch, 82 U. S., 460, and Central Railroad *v.* Georgia, 92 U. S., 665.

In the former case the act provided that upon the written consent of all the stockholders of the South Carolina Canal & Railroad Company the said South Carolina Canal & Railroad Company shall be merged in the said South Carolina Railroad Company. It was held that the South Carolina Railroad Company retained the rights which it had before the merger.

The case of Railroad Co. *v.* Georgia was to the same effect.
42 There the Macon & Western Railroad Company was merged under the name and charter of the said The Central Railroad & Banking Company of Georgia.

But in Railroad Co. *v.* Georgia, 98 U. S., 359, it was held that where a consolidation took place the effect was the creation of a new corporation out of the stockholders of the two previously existing corporations. It was said: "The consolidation provided for was clearly not a merger of one into the other, as was the case of Central Railroad & Banking Company *v.* Georgia, 92 U. S., 665."

The question was raised in a case where this same defendant was a party in interest, in Shields *v.* State, 26 Ohio St., 86. In that case the court say: "Among the companies forming this consolidation were two Ohio companies, chartered and organized before the adoption of the present constitution, and whose charters were therefore not

subject to the provision of the present constitution, which gives to the legislature the power of alteration, amendment, and repeal of charters. * * * The consolidation took place in 1869, and was effected in all respects in pursuance of the act of April 10, 1856, and the claim is that a consolidation under that act is to be regarded in law as a surrender or relinquishment of the several individual charters of the companies so uniting and the acceptance of a charter *de novo* from the State."

The court held that the consolidation constituted a new corporation, and the fact that it was formed out of old, defunct corporations did not make it any the less a corporation created by the legislature. It was said: "It is not the material out of which it is formed, but the plastic hand that formed it, that we look to for its character and status under the constitution." This case was affirmed on appeal by the Federal Supreme Court in 95 U. S., 319.

The question was again before the Federal court in St. Louis & San Francisco Railway Company *v.* Gill, 156 U. S., 649. In that case there was a consolidation of two railroads operating in Missouri and Arkansas. It was claimed that notwithstanding this legislation the railroad company, so far as related to its busi-
43 ness in Arkansas, was entitled to fix its rate of charges in accordance with the law of its original corporation.

The court said: "It has been frequently decided by this court that a special statutory exemption or privilege, such as immunity from taxation or a right to fix and determine rates of fare, does not accompany the property in its transfer to a purchaser in the absence of express direction to that effect in the statute," thus treating the consolidation as a purchase by the new entity.

III. Passing by the third contention and considering first the effect of article 19*a*, section 1, of the constitution, this section reads as follows: "The legislature may, from time to time, pass laws establishing reasonable maximum rates and charges for the transportation of passengers and freight on different railroads in this State," etc.

The contention is that this section is a limitation upon the authority of the legislature, and that as to the fixing of rates the power is exhausted when maximum rates are established, and that the act in question is not a fixing of maximum rates within the constitutional provision.

In the opinion of Mr. Justice Cahill in Wellman *v.* Railway Co., 83 Michigan, at page 624, it is said: "Nor do I think that the constitutional amendment of 1870, before cited, which expressly provides that 'the legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State,' is no more than declaratory of a power that already existed. * * * The amendment of 1870 was neither a grant nor a limitation of power. It was a declaration of power already reserved in the constitution, and the amendment served only to put beyond question the right of the legislature, which was before thought to be open to debate."

The maxim *expressio unius est exclusio alterius* is not wholly inapplicable in the interpretation of constitutional provisions.
44 See Endlich on Interpretation of Statutes, sec. 533; Cooley's Con. Lim., pp. 78 and 79.

Speaking of this rule as applied to the construction of constitutional provisions, Mr. Justice Green, speaking for the court in Williams *v.* Mayor, etc., 2 Mich., 563, said: "That certain legal maxims or rules of construction which have been found generally applicable afford important aid in arriving at the intention of those who framed the law every lawyer will admit; but that there are some instruments or laws to which such maxims cannot be strictly applied without doing manifest violence to the plain intent of the framers of the law is also a matter of common experience. This is especially true in the construction of State constitutions, as will appear manifest when we consider their character and objects."

See also Commonwealth *v.* Hartman, 17 Pa. St., 118; People *v.* Wright, 6 Col., 92; Matter of Thirty-fourth Street R. R. Co., 102 N. Y., 343.

The constitution of New York placed certain restrictions upon street railway companies. The legislature by a general act embodied the constitutional conditions and annexed a third or additional condition not enjoined by the constitution. The contention was made that the constitution had prescribed the conditions upon which street railroads might be constructed, and by implication thereby enjoined the imposition by the legislature of conditions other than those prescribed therein.

The court said: But the constitution neither by express language nor by implication abridges the legislative power over the subject outside of the matters particularly enumerated. It needs no citation of authorities to sustain the postulate; that, except as restrained by the constitution, the legislative power is untrammeled and supreme, and that a constitutional provision which withdraws from the cognizance of the legislature a particular subject, or which qualifies or regulates the exercise of legislative power in respect to a particular incident of that subject, leaves all other matters and incidents under its control. Nothing is subtracted from the
45 sum of legislative power except that which is expressly or by necessary implication withdrawn. The legislature is prohibited from granting a franchise to construct a street railroad except upon certain specified conditions; but it is not prohibited from annexing further conditions not inconsistent therewith, and whether other conditions are necessary or proper is a matter resting in the wisdom and discretion of the legislature.

It is said that the statute having fixed the maximum rate at three cents as to certain roads earning less than two thousand dollars per mile and two and a half cents and two cents respectively for roads earning more than two thousand dollars per mile that this exhausts the power of the legislature, and that no power exists to provide for a less rate where mileage books are used.

In my judgment the term maximum rate as used in this consti-

tutional provision means the maximum rate which the company is to be permitted to charge under a given set of circumstances. Under the terms of this act the company not furnishing mileage books may be compelled to furnish them at the rate of two and a half or two cents a mile respectively, or it may charge for the single fare three cents. By this same act all roads are entitled to charge three cents per mile for a distance not exceeding five miles.

It might be said, with as much force as the proposition under discussion can be urged, that by this provision the legislature has fixed the maximum rate at three cents and thereby exhausted its power. The answer is obvious, viz., that in fixing the rate at three cents for a distance less than five miles (in the lower peninsula) the legislature fixed the maximum rate for that service to be paid the road by one making just that contract. If this answer is not valid, the court and counsel in the Wellman case overlooked wholly a controlling question which would have ruled the case the other way from that in which it was decided.

In the case of The Interstate Commerce Commission *v.* Baltimore & Ohio Railroad Co., 145 U. S, 263, section 2 of the interstate commerce act was under consideration. That section provides "that if any common carrier subject to the provisions of this act shall,
46 direct or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The language of Judge Jackson, of the circuit, was approved as follows: "To come within the inhibition of said sections, the differences must be made under like conditions—that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons or classes between whom differences in charges are made must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one or undue disadvantage to the other in order to constitute unjust discrimination."

IV. It is difficult to define the precise limit of power reserved to the legislature under a provision embodied in the fundamental law or incorporated in the charter of a corporation reserving the right to the legislature to alter, amend, or repeal.

The question has been before this court in numerous cases, the latest being the case of Attorney General *v.* Looker, 69 N. W. Rep., 929, where the authorities are collated.

In the case of Detroit *v.* Detroit & Howell Plank Road Co., 43 Mich., 140, Mr. Justice Cooley, speaking of the provision of the Constitution of the United States which forbids the impairing of obligations of contracts, says that but for this provision "the power to amend
47 and re*a*peal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations and with the powers which it would then possess. It might therefore do what it would be inadmissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles; and it cannot be necessary at this day to enter upon a discussion in denial of the right of the Government to take from either individuals or corporations any property which they may rightfully have acquired."

We think this is a fair statement of the effect of this reservation, and that if the legislation in question can be construed as depriving the respondent of its property it is invalid, as conflicting with other constitutional provisions; but we do not think that such is the effect of this legislation. It cannot be said that the right to use property dedicated to a public use in precisely the manner which the owner may choose to use it is a vested right of property. This question has been put at rest by a long line of decisions, beginning with Munn *v.* The People, 69 Ill., 80, and including Wellman *v.* Railway Co., 83 Mich., 592.

The chief contention is that because this statute requires the company to enter into contracts for future transportation of passengers covering a period of two years it is therefore withdrawing from the company the right to manage its own property, and is, for this reason, invalid.

It may be said that every attempt to fix rates of toll or rates for the carriage of passengers or transportation of property to some extent involv*ing* an interference with the management and control of its property by the railroad company. Having in mind the common method of conducting railroad business at the present day, the court can take judicial notice of the fact that nearly every railroad in this State does issue and did, prior to the enactment
48 of this law, issue mileage books or one-thousand-mile tickets. The conditions were not precisely the same, but they were contracts good for one year and issued at a reduced rate, so that in the usual conduct of business time contracts for the transportation of passengers are made. In fact, it would be difficult to conceive of a method of conducting a railroad business which did not involve a contract good for some length of time.

In the brief of the learned counsel for respondent we are cited to a large number of cases in which it has been held that it is competent for railway companies to make regulations limiting the time within which a ticket may be used, and this is undoubtedly true in the absence of legislation, but we think it cannot be successfully contended that it would not be competent for the legislature to provide that a ticket furnished to a passenger should be good for a

definite reasonable time, and when such legislation was adopted it would of necessity deprive the company of the power to make rules inconsistent therewith.

I confess I cannot share the apprehension that such a regulation as the one here involved will deprive the company of the management of its business. Would any one contend that the legislature has not the power to require railroad companies to keep on sale at its station tickets of any kind? The compulsory requirement of this act may indeed be denounced as an attempt to conduct the business of the company, but I apprehend that extended argument is not necessary to defend the right of the legislature to make such requirement.

In Elliott on Railroads, section 1598, it is said that "in some of the States it is provided by statute that tickets shall be good for a certain number of years, notwithstanding any limitation thereon."

I am not aware that these statutes have been attacked. If such enactment be within the power of the legislature, where is the line to be drawn short of that fixed by the Federal Supreme Court, which is that legislation of this character must not be so unreasonable as to deprive the company of the use of its property.

49 The only case to which our attention has been called in which the subject of legislation requiring the sale of mileage books has been under consideration is that of The Attorney General *v.* Old Colony Railroad Co., 160 Mass., 62. The legislation there under discussion provided for an interchangeable mileage book, good on all the roads of the State. The court divided, a majority of the court holding such legislation to be unconstitutional, in that it required one company to do business upon the credit of another. The majority of the court distinctly limit the decision to that ground, and apparently did not find a regulation requiring the issue of mileage books to be unreasonable. Mr. Justice Knowlton, with whom Mr. Justice Holmes concurred, reached the opposite conclusion, and of necessity affirmed the power of the legislature to provide for the issuing of mileage books.

My conclusions are that the regulation is not unconstitutional as applied to roads within the control of the legislature, and that the respondent road by its consolidation, formed as it is by a consolidation under an act passed since the enactment of the constitution reserving the power to alter, amend, or repeal, is subject to the general control of the legislature, and that the judgment of the circuit court should be affirmed.

R. M. MONTGOMERY.
CHAS. D. LONG.
J. B. MOORE.

50 Supreme Court of Michigan.

HENRY C. SMITH, Relator,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

By act No. 90, public acts of 1891, the railroad law was amended, fixing the maximum rate for the transportation of passengers at from two to three cents per mile, according to the gross earnings of the passenger trains of the various roads. The same act requires all railroad companies in this State or carrying on business partly within and partly without the State to keep for sale at their principal ticket offices thousand-mile tickets, to be issued in the name of the purchaser, his wife and children, and to be valid for two years, at the rate of twenty dollars in the lower and twenty-five dollars in the upper peninsula. The relator tendered the respondent-defendant twenty dollars and demanded a thousand-mile ticket, to be issued in the name of himself and his wife. The respondent refused to accept the money and issue the ticket, whereupon the relator filed a petition in the circuit court for the county of Lenawee, praying for the writ of mandamus to compel the issuance of the ticket. The court below granted the order and the respondent appealed.

The constitution, article 19, section 1, provides that "the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State," etc. One of the railroads doing business in this State contested in the courts the validity of the above provision fixing maximum rates. That provision of the law was held valid. Wellman *v.* C. & G. T. R'y Co., 83 Mich., 593.

51 That decision held that the reasonableness of the rate was for the sole determination of the legislature, and not for the courts. The case was affirmed in the Supreme Court of the United States, that court, however, holding that the reasonableness of the maximum rate was for the determination of the courts and not exclusively in the legislature, and that whenever that rate was so low as to deprive the railroad companies of a reasonable income from their legitimate investments the result was to deprive them of their property, or, what is the same thing, the use of it, without due process of law, and therefore void under the Constitution of the United States. Wellman *v.* C. & G. T. R'y Co., 143 U. S., 339.

It is now the established rule that the question is a judicial one, and that while the courts cannot establish the charges they will inquire into their reasonableness and determine whether the rates are such as to deprive the corporation of their property without due process of law. St. L. & San Fran. R'y Co. *v.* Gill, 156 U. S., 657, and authorities there cited.

But the above decisions and many others upon the same subject, which are cited in the briefs of counsel, do not in my judgment

bear upon the question now raised. All those cases involve the validity of maximum rates fixed by the legislatures under the implied or express power of the State constitutions. The difficulty which for a long time confronted the courts was not in determining whether the power to fix a reasonable maximum rate existed, but what was the limitation of the power. As late as 1893 the supreme court of Massachusetts, in Attorney General *v.* Old Colony Railroad, 160 Mass., 89, recognized the existence of the power, but said, "It is not yet settled, however, what the limitations of this power are, whether it is limited to such rates as a court may deem reasonable or only to such rates as shall not operate to deprive the railroad companies of their property without reasonable compensation or without due process of law." That question was settled in Railway Company *v.* Gill, *supra*, decided the following year. We are
52 cited to no case, nor have I been able to find any, which involves a legislative enactment like the one now presented for our determination.

Several defences are interposed, but I deem it important to refer to but one, which I think is conclusive against the relator, viz: Does the legislature possess the power under the constitution of this State to enact this provision requiring railroad companies to fix charges below the maximum rates, and compel them to enter into contracts for two years or for any number of years which the legislature may see fit to prescribe?

The learned counsel for the relator contend that the power is inherent in the legislature to "regulate, control, and fix the conditions of all contracts between railroad companies and their patrons." They further say, "It is merely a regulation of the public business, which the legislature has the right to regulate. Its apparent object is to promote the convenience of persons having occasion to travel on the road and to reduce for them the cost of transportation. Its benefit to the public who are compelled to patronize railroads is unquestioned. It brings the reduction of rates of two cents per mile within the reach of all persons who may have occasion to make only infrequent trips."

No authority is cited which sustains so unlimited a power. If it be sustained these companies have no control over their affairs and business, except to carry out such contracts for common carriage as the legislature may see fit to prescribe. If the legislature may compel these companies to carry married men, their wives and children, at reduced rates, it may also include their servants and employees upon the same ticket, and also the transportation of their goods at reduced rates. It may require the issuance of these tickets to clubs of two or any greater number. It may fix excursion rates at still lower figures and prescribe the time for which they may be valid. It may make such contracts valid for any number of years; and under the relator's contention the courts must determine in each case whether the requirements are reasonable. Certainly citizens who have invested their money in these corpora-
53 tions are entitled to some control over their business and affairs. It is difficult to understand what control is left to

them if this law be sustained. Under the opinion of the learned circuit judge who heard the case he should have denied the writ. His opinion is against the judgment rendered. He used the following language: "Upon the other questions I care only to remark that this particular provision of the statute, the aid of which is invoked in this case, if constitutional, would seem almost to extend the police power of this State to the practical management of the business of the railway companies, and leave no line beyond which it could be said that the State cannot assume to control what are practically the private business affairs of the corporation. And it certainly will not be contended in the present condition of the law that there are not elements of the business affairs of railroad companies with which the State has no more right to interfere than with those of private individuals. The State has assumed to exercise its police power over railroad companies upon the theory of protection to the public from injuries which might arise from improper construction of its road or rolling stock or from faulty operation of them. Thus it assumes to control the construction of its engines and cars so far as the question of the safety of persons using them may require; the operation of its trains so far as it is necessary to protect the persons on them and those who may rightfully be upon its tracks; the grade at which they may cross one another, with the same idea in view, and as well the maximum rate of fare so far as necessary to protect the public from extortion; but mere questions of expediency have not been considered the subject of legislative control. Considerations of this nature would tend to lead me to the conclusion that this law ought not to be sustained, did I feel myself free to pass upon such a question."

It was, in my opinion, the clear duty of the circuit judge to enter judgment in accordance with his convictions.

The constitution grants the legislature the right to fix a reasonable maximum rate. This excludes the power to fix any
54 other rate. It affords the public ample protection against exorbitant and unjust charges. An affirmative grant of power often, though not always, implies an exclusion of other supervision upon the same subject. Mr. Story says: "The truth is that in order to ascertain how far an affirmative or negative provision excludes or implies others we must look to the nature of the provision, the subject-matter, the object, and the scope of the instrument. These and these only can properly determine the rule of construction. There can be no doubt that an affirmative grant of power in many cases will imply an exclusion of all others." Story on the Constitution, sec. 448. Does not the express power to fix a maximum rate exclude the power to fix a maximum or any other rate? If this same act had fixed a minimum of two cents per mile and prohibited the carriage of passengers at a less rate, would counsel contend for the existence of these powers? The result of such a provision would be to prevent railroads from giving cheap excursions, now so common, and which accom-odate and benefit the people. The object of this constitutional provision is to prevent the imposition of extortionate or unreasonable charges and to secure to

the traveling public a just and reasonable charge, one which would give a reasonable return to investors and a fair and reasonable rate to the public. The legislature performed this function by fixing two, two and a half, and three cents per mile as just and reasonable maximum rates. The public are thereby protected. Why should not all contracts within that rate be left to the railroad companies? Is not that a reasonable construction to be placed upon this clause of the constitution? If these companies choose to accom-odate the public by offering reduced rates by mileage, coupon, club, or excursion tickets is not that within the reasonable maximum rate fixed and a proper matter for their own control? I can find no reason or excuse for holding otherwise.

If, however, I am wrong in the conclusion that this express power inhibits the exercise of any other upon the same subject, I am still of the opinion that the act cannot be sustained under the
55 police power inherent in the legislature under the constitution. The legislature does not possess all the powers not inhibited by the constitution, and when one seeks to defend its acts under the police power he must be able to show that the act is for the protection of the lives, persons, property, or rights of citizens, or for the safety and good order of society.

The police power inherent in the legislature is not broad enough to cover every legislative interference with property or personal rights upon the ground that there is no express inhibition of the power to be found in the constitution. Every person has the inalienable right to the possession, use, and control of his property and business so long as he observes the common-law maxim, *sic utere tuo ut alienum non lædas*. The legislature may authorize municipalities to determine of what material the merchant or manufacturer shall construct his building within the city limits, to see that they are properly built, and that the plumbing, sewerage, etc., are sanitary. These things are essential to protect the health and lives of employés, patrons, and the public generally. The general public is interested, and hence the legislative interference with what are otherwise the natural rights of individuals is essential and necessary for the good of all; but if the legislature should attempt to fix the size of the building, the dimensions of its rooms, the price of merchandise to be bought and sold, when he should open or close his store or factory, and the terms of contracts he should make, the courts would not hesitate to declare such acts unconstitutional, notwithstanding no express inhibition can be found in the constitution. The common law secured these rights to the citizens because their exercise created no injury to others nor was of concern to the public. They were within the maxim above quoted. When the constitution was adopted these common-law rights were preserved, and it was unnecessary to declare in the constitution that they remained sacred and intact and that the legislature could not interfere with them. The constitution was adopted with reference to these
56 existing rights and impliedly inhibits the legislature from infringing upon them. Among these inherent rights of the citizen is the power to conduct his own business and to make such

contracts as he pleases. This right is the same whether the citizen be a natural or an artificial person. Only when the general public are concerned, for their own safety and protection, may the people, through the legislature, protect themselves against exhorbitant charges or the conduct of business in a manner injurious to the public.

The constitution is entirely silent upon the subject of contempts. Yet it is held that the legislature cannot take away this power from the courts, which has from the earliest time been inherent in them. *In re* Chadwick, 67 N. W. Rep., 1071, we there said: "The constitution leaves this power existing in the court, as it was at the common law." So the constitution leaves to the citizen the control of his property and business, subject to the rules of the common law. "Constitutions are to be construed in the light of the common law and of the fact that its rules are still in force." 3 Am. & Eng. Enc. of Law, 679.

Justice Cooley states the rule thus: "The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety, or welfare of society." Cooley's Con. Lim., 577.

Black says it includes "all such regulations as may be necessary for the safety and good order of society," and adds: "It is evident that the term 'police power' is a very flexible and comprehensive expression and difficult of exact definition. But it must not be extended beyond its necessary and proper limits. When the police power has fulfilled the essential objects of its reservation to the State it has also reached the boundaries of its legitimate exercise." Black, Constitutional Prohibitions, secs. 61, 62.

Has it not fulfilled "the essential object" in this case by fixing a maximum rate? No claim is made that this maximum rate is not a sufficient protection to the public. Upon what principle
57 of law or justice, then, can this power be invoked by the State to control contracts between its citizens which do not injuriously affect the public or any member thereof? If this legislation cannot be upheld under the police power—and, as already shown, this is virtually conceded—it logically follows that the legislature is vested with unlimited power to regulate and control the management of these corporations, solely because the constitution does not in express terms prohibit. This is a doctrine which in my judgment finds no support in authority or reason. Whether railroad companies should issue the tickets in question is a matter of little importance, but the establishment of a rule of control is of great importance. All roads issue one-thousand-mile tickets; some issue these family tickets and some issue one-thousand-mile tickets upon which any number of passengers may ride. When the police power is set aside the door is open to the legislature to prescribe contracts of all kinds. This is well stated in the opinion of the circuit judge. A somewhat extended discussion of the question is therefore appropriate.

The general rule is not questioned that "the authority of courts of justice to declare void any legislative enactment must be found

in express constitutional provisions limiting legislative power." Text writers and courts have recognized that this rule has its exceptions, and that there are implied as well as express inhibitions. The learned author, Justice Cooley, after stating the general rule, says, "It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. * * * The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do cannot be considered any grant or apportionment of power which the people in general terms have made to those departments." Cooley's Con. Lim., 174–'5.

58 In the early case of Calder *v.* Bull, 3 Dall., 386, the Supreme Court of the United States said: "I cannot subscribe to the omnipotence of a State legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the State. The people of the United States erected their constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it; the nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments that no man should be compelled to do what the laws do not require, nor to refrain from acts which the laws permit. There are acts which the Federal or State legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power, as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property, for the protection whereof the Government was established. An act of the legislature (for I cannot call it a law) contrary to the first great principles of the social compact cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact and on republican principles must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act which when done was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that make a man a judge in his own cause; or a law that takes property from A

59 and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers, and therefore it cannot be presumed that they have done it. The genius, the nature, and the spirit of our State governments amount to a pro-

hibition of such acts of legislation, and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid, and punish; they may declare new crimes and establish rules of conduct for all its citizens in future cases; they may command what is right and prohibit what is wrong; but they cannot change innocence into guilt or punish innocence as a crime or violate the right of antecedent lawful private contract or the right of private property. To maintain that our Federal or State legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy altogether inadmissible in our free republican government."

In Durkee *v.* Janesville, in discussing the power of the legislature to exempt the city of Janesville from the payment of costs in tax cases brought against the city when the city was defeated, the court said that they "care very little whether it is placed on those fundamental principles of law and justice which in our form of government it has been held no legislative body can override, even though not prohibited by the written Constitution, or upon the provisions of the Constitution itself, some of which clearly forbid the enactment of such laws." 28 Wis., 467.

These two cases were cited with approval in a unanimous opinion by this court: Wilder *v.* R'y Co., 70 Mich., 382; see also Park *v.* Free Press Co., 72 Mich., 560.

In the noted and leading case in this State of People *v.* Salem, 20 Mich., 452, it was vigorously urged by two eminent lawyers that the power of the legislature to authorize municipalities to pledge their credit for the construction of railroads was not expressly inhibited by the Constitution, and therefore must be held to exist. The court took the opposite view, and in the majority opinion, written by Justice Cooley, said: "There are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words"—p. 473.

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It may be proper here to remark that that case held that "railroads are no longer public works, but private property. Individuals and not the State own and control them for their own profit. The public may reap many and large benefits from them, and, indeed, are expected to do so, but only incidentally and only as they may reap similar benefits from other modes of investing private capital"—p. 485. See also page 489 of the same case.

Justice Christiancy, a learned jurist, said in People *v.* Mich. Plank Road Co., 9 Mich., 306, "Powers, the exercise of which can only be justified on this specific ground (the police power), and which would otherwise be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort, or well being of society or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the

particular case, notwithstanding the language of the prohibition would otherwise include it."

Now, let us apply to the present case the rule given by Mr. Justice Cooley that the "regulation must have reference to the comfort, safety, or welfare of society." Certainly it does not affect or promote the comfort or safety of society or any member of it. The learned counsel say, "Its apparent object is to promote the convenience of persons having occasion to travel." In what way does it promote this convenience? It can promote the relator's convenience only by permitting him to buy one ticket instead of two or more. This is too trifling a convenience to deserve consideration.

I am not aware of any decision holding that mere convenience is a test for the exercise of the police power, but if it were the law would not regard the purchase of one ticket instead of two or more a public convenience. Counsel further say, "It brings the reduction of rates of two cents per mile within the reach of all persons who may have occasion to make infrequent trips." Do those "who have occasion to make only infrequent trips" constitute the general public? The provision is not for the benefit or convenience of those who travel on business, for it is the universal custom of railroads to issue one-thousand-mile tickets to individuals. Obviously, it will not benefit the great mass of the people, few of whom would expend $20 or $25 at one time on a ticket. The sole benefit is a pecuniary one to the rich and well-to-do, who would purchase such tickets for visiting or pleasure. Counsel do not appear to seriously claim that the requirement comes within the rule above stated, but rest their contention upon the broad proposition that the legislature may absolutely control the management of railroad corporations because they are engaged in a public business—that is, a business in which the general public are interested. The argument that this requirement of the statute is essential to "the comfort, safety, or welfare of society" refutes itself and cannot be sustained upon the principle of inherent police power.

The argument of counsel logically leads to the conclusion that the legislature may manage and control the business of the railroads of this State just as fully and completely as it could if the State owned them. The State did once own three railroads, of which the respondent was one, and managed them. It did not make a success of the business and sold them to private parties. Is it possible to hold that the State, by implication, reserved the exclusive right to manage, direct, and control them, and determine what contracts they should make, and then that the courts should determine whether they were reasonable? No such reservation is found in the articles of sale or in any law of the State under which other roads have been constructed. Upon what principles can courts read such reservation into the law? Neither legislatures nor judges are experienced in the business of running railroads. Why should the former be authorized to make contracts for them and the latter to determine their reasonableness when such contracts have no "reference to the comfort, safety, or

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welfare of society"? The property of railroads is private property. Neither the State nor the public has a penny invested in them. Private capital has contributed every dollar to their construction and equipment. Their owners have built them for private profit and not as public benefactors; otherwise the Salem case was wrongly decided. Railroad companies are common carriers pure and simple. They are not public corporations in the sense that municipal corporations are public. They are termed quasi-public corporations only because the general public may deal with them, and are entitled to have themselves and their goods carried by them, and are therefore subject to those regulations which are necessary for the protection of the public. This proposition is well stated in the opinion of the learned circuit judge above quoted. The mere fact that the constitution and the statute have given these common carriers the power to obtain a right of way over private property by agreement or condemnation does not confer upon the legislature the power to control their management as if they were the sole property of the State. Individuals in their natural capacity may build a railroad over their own lands and over the lands of others, where by agreement they obtain the right of way, and may hold themselves out to the public as common carriers of freight and passengers. The public would have the same right in such a common carrier as they would have in a corporate common carrier organized under the general laws of the State. The fact that a right of way may be condemned for the benefit of the common carrier as well as for the public cannot logically be held to make such common carrier a strictly public corporation, over which the legislature has the same control as it has over municipal corporations or over its own property. Article XV of the constitution treats of corporations. Section 9 authorizes corporations
63 other than municipal to take private property for public use—that is, a use in which the public have a public interest and in which the private corporation has a private interest. Section 15 authorizes municipalities to take private property for public improvements. Section 14 of article XVIII authorizes the taking of land for private roads.

We need not discuss to what extent these provisions involve the exercise of the power of eminent domain. "Eminent domain is the right or power of a sovereign State to appropriate private property to a particular use for the purpose of promoting the general welfare." Lewis, Em. Domain, sec. 1, 6 Am. & Eng. Enc. of Law, 511.

In its original and strict sense it implies that the State takes the land and compensates the private person for his damages. Grotius wrote, "When this is done the State is bound to make good the loss to those who lose their property." It is now universally held that this right may be delegated to private parties, corporate or individual; but I submit that such delegation to private parties does not take away from them all their common-law rights and vest them in the State, subject to the judgment of courts as to the reasonableness of the control exercised by the State.

It follows that the inherent power in the legislature to fix rates of carriage by railroads is based upon precisely the same principle as is the power to fix the rates to be charged by all common carriers, such as hackmen, ferrymen, and other carriers of persons and of freight. No one would contend that the legislature could require hackmen or ferrymen or owners of omnibuses to enter into contracts with their patrons to carry them for two years at a rate below the amount otherwise fixed by law, or that they should carry married men and their families at reduced rates.

The legislature of Illinois passed a law fixing a maximum charge for elevating and storing grain. The law was attacked as unconstitutional, but was sustained by the Supreme Court of the United States upon the ground that the public had an interest in
64 the business, and it was therefore subject to the control of the legislature, so far as fixing the rates was concerned, thereby protecting the public from exorbitant charges. Munn *v.* Illinois, 94 U. S., 113.

The same principle is the basis for the exercise of the police power in regard to railroads, elevators, hacks, ferry-s, etc. If the legislature does not possess the power in the one case to compel the party, whether natural or artificial, to enter into contracts for the future, neither does it in the other. This subject is so fully and exhaustively treated in both the majority and minority opinions in that case that I will not discuss it further; but for the purpose of showing the basis upon which courts have sustained the legislative power to fix maximum rates, I quote the following from the majority opinion:

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by common laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private—Thorp *v.* R. B. R'y Co., 27 Vt., 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself and so use his property as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non lædas.* From this source came the police powers, which, as was said by Mr. Chief Justice Taney in the License cases, 5 How., 583, 'are nothing more nor less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one toward another and the manner in which each shall use its own property, when such
65 regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers,

inn-keepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."

The opinion cites Auldmut *v.* English, 12 East., 527, in which was involved the right to charge arbitrary rates for storage, and quotes from the opinion in that case as follows: "But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that when private property is affected with a public interest it ceases to be *juris privati* only; and in case of its dedication to such a purpose as this the owners cannot take arbitrary and excessive duties, but the duties must be reasonable."

The act, moreover, seriously interferes with the power of subsequent legislatures to change and increase the maximum rate should the financial condition of the railroad companies appear to demand it. Thousands of contracts would undoubtedly have been made which would run two years after the act of a subsequent legislature increasing the rate. It is, furthermore, obvious that parties acting upon the probability of a repeal of the previous law and the enactment of another increasing the rate would purchase tickets by the thousand. The legislature could not annul the contracts made under the prior law. A contract valid when made is valid till executed, and the legislature could not annul it. If they make these contracts to extend over two years, I see no reason why they may not be made to extend over 4, 8, or 10, nor do I see any grounds upon which courts could hold them unreasonable. It can make no difference whether a contract is entered into voluntarily or by a provision of the law; they are equally valid and binding. The State cannot direct that to be done which it could not do itself were it engaged in the business. If this railroad were owned by the State, as it once was, and the State should make such contracts extending over two or
66 more years, it would be held to the fulfillment of its contracts even if it were dishonest enough to attempt to repudiate them.

It is immaterial that some railroad companies have issued tickets of the kind provided by this act, or that the respondent has issued one-thousand-mile tickets to single individuals. The power of the legislature is not to be tested by the voluntary acts of the parties over whom control is sought to be exercised. Because common carriers have made contracts with their patrons, the legislature is not therefore authorized or justified in enacting that such contracts shall be made. The same rules of construction must apply as would be applied if a thousand-mile ticket had never been issued and the legislature were attempting for the first time to compel their issuance. If the legislature possessed the power to so enact, subject to reasonableness, the fact that such contracts had been voluntarily made would be evidence of the reasonableness of the law compelling them, but it is of no force whatever in determining whether the power exists. Probably all railroad companies have issued excursion tickets at less than a cent a mile and valid for a few days. Does this fact authorize the legislature to enact that such companies must give these excursions, and to determine how often, at what

rate, and the time within which the tickets shall be good for passage? Is this within the constitutional power of the legislature, either express or implied, to protect the public from extortion by fixing reasonable maximum rates?

The opinion of the court below should be affirmed, but its judgment was erroneous and should be reversed and the petition dismissed with the costs of both courts.

C. B. GRANT.

67 Supreme Court of Michigan.

HENRY C. SMITH, Relator,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

I concur in the conclusion reached by my brother Grant. Our constitution, adopted in 1850, provides that "the legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State, and shall prohibit running contracts between such railroad companies whereby discrimination is made in favor of either of such companies owning connecting or intersecting lines of railroad." Constitution of Michigan, article XIX*a*, section 1.

Acting upon this authority, the legislature fixed a maximum rate per mile for the transportation of passengers which the railroads might charge. The first attempt to do more was by an act which recognized the short haul and allowed a higher rate per mile for short distances than for long. It is now proposed by the act under consideration to discriminate in favor of the passenger who shall purchase transportation in large quantities by giving him a lower rate, and to give special advantages to men of family. Will the next step be a law requiring the sale of transportation for freight at a reduced rate to large shippers?

Without discussing the propriety of discrimination by the railroad companies, based upon competition and common business principles, we may well doubt the validity of legislation requiring it. The interstate-commerce act seems to have been designed to prevent the very thing that this law requires. I have doubts of the
constitutionality of legislation which does more than to assure
68 to any person the right of carriage upon payment of the ordinary lawful fare.

Under the constitution our legislature may fix a maximum rate, and while the question of discrimination growing out of the long and short haul was not discussed, the validity of such legislation may be settled by the Wellman case, 143 U. S., 339.

I am of the opinion, however, that the legislature has no power to say that a ticket shall be sold to one man cheaper than to another, or that it shall have a broader effect, and therefore a greater value, to one than to another, depending upon a willingness to purchase the right to transportation in large quantities, or upon the fact that

the purchaser has a family. It might as well be made to depend upon his age, occupation, poverty, or necessity as upon his ability to purchase in quantities or to have and support a family.

Again, the word maximum cannot be ignored. It has some use in the constitutional provision. To my mind, it excludes the power of discriminatory legislation, leaving it to the railroad companies to make lawful concessions to their patrons as their business interests may require or permit.

FRANK A. HOOKER.

69 At a session of the supreme court of the State of Michigan held at the supreme court room, in the capitol, in the city of Lansing, on the second day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Charles D. Long, chief justice; Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, associate justices.

HENRY C. SMITH, Relator,
*vs.*
LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Appellant.

In this cause an application for a rehearing is duly submitted.

70 STATE OF MICHIGAN:

Supreme Court.

HENRY C. SMITH, Relator,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

*Application of Respondent for Hearing.*

To the honorable the supreme court of Michigan:

The respondent, The Lake Shore and Michigan Southern Railway Company, above named, respectfully prays that a rehearing of the above-entitled cause may be had in this court for the reasons appearing in the accompanying statement.

ASHLEY POND,
A. C. ANGELL AND
C. E. WEAVER,
*Attorneys for Respondent.*
GEO. C. GREENE, *Of Counsel.*

71 STATE OF MICHIGAN:

Supreme Court.

HENRY C. SMITH, Relator,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

To the honorable the supreme court of the State of Michigan:

The respondent insists that a rehearing should be granted by the supreme court, because, as appears by the opinion of the majority of the court, the principal contention of the respondent, upon which it claimed the act of 1891 was repugnant to, inconsistent with, and in violation of the constitution of the State of Michigan, was entirely overlooked or ignored by the majority of the court, and was not referred to or in any manner answered.

In the opinion it is said:

"Fourth. It is contended that the amendment to the constitution, article 19*a*, sec. 1, is a limitation upon the power of the legislature to legislate as to rates and charges of transportation, and limits the right in that regard to the fixing of maximum rates, and that the provision for the issuing of a mileage book is not a fixing of maximum rates of charge, but is a further regulation."

And again:

"The contention is that this section is a limitation upon the authority of the legislature, and that as to the fixing of rates the power is exhausted when maximum rates are established, and that the act in question is not a fixing of maximum rates within the constitutional provision."

The "contention" thus stated by the court is the only one
72 based on the State constitution which the court states, mentions, or discusses.

While it is true that incidentally it was claimed by respondent, as one reason why the act should not be upheld, that "the express provision of the constitution conferring upon the legislature power within definite limits over the matter of rates to be charged by railroads implies an exclusion of all other powers over the same subject," yet that was not the principal ground stated in briefs or orally argued at length against the constitutionality of the act.

The contention of the respondent was stated at pages 5, 6, and 7 of my brief to be—

"That so much of the act in question as requires the railroad companies to issue tickets good for transportation of the purchaser and his family for two years at a rate of fare of two cents per mile, being one cent a mile below the maximum rate, is—

First, repugnant to the constitution of this State, which declares that the legislature may from time to time establish maximum rates."

"The act of 1891 is inconsistent with, repugnant to, and in violation of the above constitutional provision, and if upheld will to a

certain extent disable future legislatures from exercising the power conferred by the constitution.

"I insist that the legislature has no power to require a railroad company to enter into a contract the effect of which may be to deprive the company of the constitutional right to have maximum rates in all cases established from time to time or modified at any time the legislature may see fit to act.

"The power to require corporations to enter into executory contracts with its patrons, binding it to perform certain service for a term of years at a fixed price or rate, conflicts with and vastly exceeds the power to simply establish maximum rates from time to time.

"It was evidently contemplated when the constitutional
73 amendment in question was considered and adopted that circumstances would require changes from time to time in established maximum rates, and that that power was to be exercised by the legislature from time to time, as circumstances and conditions might require.

"But by this act the legislature of 1891 would deprive the railroad companies of the right to obtain legislation to increase the rates or of the people to obtain reduction in rates in cases where the mileage tickets had been sold, although the situation might be such as to demand such increase or reduction."

This certainly goes much farther than to merely claim that the "section is a limitation upon the authority of the legislature, and that as to the fixing of rates the power is exhausted when maximum rates are established."

In support of our contention that the provisions of the act in question were repugnant to, inconsistent with, and in violation of the constitution, and not that the legislature was limited in its power to the fixing of maximum rates, the following argument appears in the brief filed by me, at pages 8, 9, 10, 11, 15, 16, 17: Suppose the act of 1891 in force in 1897, when the legislature will next be in session, and circumstances such that it was evident rates should be not less than three cents a mile in any case, and the legislature was about to amend the act of 1891 and increase rates and repeal the mileage-ticket provision; at any time prior to the taking effect of the amendment or repeal, demands could be made, under the law of 1891, upon every railroad company for an unlimited number of mileage tickets, which the companies must sell, good for two years thereafter, and it would not be within the power of the legislature to afford any relief, because it can pass no law impairing the obligation of contracts, and the tickets are contracts. The ticket-purchasers could for two years use their mileage tickets, and the legislature could not from time to time establish the rates.

The constitution vests in the legislature power at any moment
to increase or reduce rates instanter, and the act of 1891
74 would deprive it of that power. If this act is upheld, it must follow that the legislature has power to require railroad companies to enter into contracts with shippers to transport their freight for a term of years to come, without limit, at a fixed rate,

and the companies would be bound by their contracts, although before the expiration of the contract period the rates were greatly increased.

The companies may voluntarily enter into contracts for transpor-ation of persons and property, running for such time as may be agreed upon, keeping within the rates fixed by law and not unjustly discriminating, but they cannot be compelled to enter into such contracts. They discharge their whole duty imposed by law when, upon payment of the established rate or fare, they receive and in due season transport the person or property to its destination. What today may be a reasonable rate may a year from now be unremunerative, and there is no power in one legislature to so establish rates or fares in any case, or as between any individual and any company, so that it or a subsequent legislature may not at any time and from time to time change them.

The effect of the act, if valid, would be to compel the railroad company to bind itself by contract with individuals not to avail itself of the benefits of the constitutional provision conferring upon the legislature the power to from time to time establish rates.

Suppose the legislature should enact that the maximum rates and fares upon railroads should forever hereafter, or for a term of years, be as stated in the act, would such an act be upheld and future legislatures be powerless to act? or, if it enacted that upon application of the shipper the company should enter into a contract with him that upon receiving a certain rate it would transport his property for a term of years, would the law be valid and the company be bound by it to enter into such contracts, so that it could not as to the contracting shippers have the benefit of an increased rate established by a subsequent legislature?

In principle there is no difference between such legislation
75 and the act in question.

Again, suppose this proceeding be sustained, and in obedience to the writ of mandamus the respondent issues to relator and his wife the ticket or tickets he may demand, and the next day the act of 1891 should be repealed, and the legislature should restore the fare to three cents a mile in all cases; the company, under its contract, the ticket, would be obliged to carry the relator and his wife for two years at two cents a mile, while his neighbor, who failed to secure tickets before the repeal, would have to pay three.

In order to warrant the legislature in producing such results the constitutional provision should be amended so as to authorize the legislature to establish not only maximum, but minimum and discriminative rates for transportation of passengers, and to require railroad companies to enter into contracts to carry at specified rates for a term of years.

The learned judge in delivering the opinion in this case in the court below, although he declined to decide the constitutional question involved, well said: "This particular provision of the statute, the aid of which is invoked in this case, if constitutional, would seem almost to extend the police power of this State to the practical management of the business of the railway companies and leave no

line beyond which it could be said the State cannot assume to control what are practically the private business affairs of the corporation."

It certainly cannot be seriously contended that this provision of the statute is within the "police power of the State."

The proposition under consideration was controverted by counsel for the relator in the briefs filed in the court below; but he conceded that if he was right in his contention, then the legislature can require the companies to make executory contracts, to be performed in the future, running for a period of ten, twenty, or thirty years, modified only "by the condition that the time fixed must always be within the bounds of reasonable discretion," or "provided
76 such period is not beyond the bounds of reasonable legislative discretion."

He also conceded that if he was right, the legislature can compel companies to make express contracts running into the future for the transportation of freight, and that "such power is only limited by the bounds of reasonable legislative discretion."

This is equivalent to declaring that the legislature has absolute and unlimited power to require companies to enter into such contracts for such rates and periods of time as to the legislature shall seem reasonable. A more despotic or arbitrary power it is hard to conceive.

If the legislature have the power or it is within the scope of their powers to require the execution of such contracts, then the legislature is to be the judge of what is reasonable, and the courts are powerless to review their exercise of that power or discretion.

See Sedgwick on Statutes and Constitutional Law, pp. 155–'9.
Cooley, Const. Lim. (6th ed.), pp. 52–55.

The relator's counsel brings to his support the principle that "the legislature has all the incidental and instrumental powers necessary and proper to carry into effectual execution all the express powers," but he does not tell us how or why it is necessary, in order to "establish maximum rates from time to time," to require that the companies must enter into contract to adhere to such rates for a term of years, regardless of what maximum rates fixed by the legislature may be from time to time during the term.

By the first part of the act in question the legislature establish maximum rates, but by the provisions in question, which follow, it requires the companies to accept less than the maximum rate and imposes in addition burdensome conditions upon the companies.

The relator's counsel said we do not "specify any clause of the constitution which expressly prohibits the making of such a law by the legislature." I insist that the act is inconsistent with and in violation of the provision of the constitution which gives to
77 railroad companies the right at any time and from time to time to invoke legislative action, and gives the legislature power to act in the matter of establishing maximum rates to take effect at once, unfettered by contracts involuntarily entered into under legislative compulsion.

Judge Cooley, p. 105, Const. Lim. (6th ed.), says: "Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision."

The requirement that the corporations by contracts shall establish rates for a term of years would certainly disappoint and frustrate the exercise by the legislature of the power given it by the constitution to establish maximum rates at any and all times.

Every legislative body, unless restricted by the constitution, may modify or abolish the acts of its predecessors. There is no way in which a legislative act can be made irrepealable, except it assume the form and substance of a contract.

3 Enc. of Law, 691, citing Cooley, Const. Lim., 125.

Here the legislative body by the act in question deprives the subsequent legislature of this power by requiring the corporations to enter into contracts, which, so far as parties hereto are concerned, would render any subsequent act of the legislature inoperative, as it is beyond its power to impair the obligation of contracts.

"The inhibitions of the constitution as to legislation are equally effective when they arise by implication as by expression, and this is the case when the legislative provision is repugnant to some provision of the constitution."

Page *v.* Allen, 58 Pa. St., 338; 98 Am. Dec., 272.

"Expression of one thing in constitution is necessarily the exclusion of things not expressed, and this is especially true of constitutional provisions declaratory in their nature."

*Id.*, 58 Pa. St., 338; 98 Am. Dec., 272.

In Commonwealth *v.* Maxwell, 27 Pa. St., 444, it was held:

"A law that is unconstitutional is so because it is either an assumption of power not legislative or because it is inconsistent
78 with some provision of the Federal or State constitution."

In Hanson *v.* Vernon, 27 Iowa, 28 (1 Am. Rep., 215), Dillon, J., says:

"It is well-settled principle of American constitutional law that an act of the legislature may be unconstitutional in two ways: 1st, because it assumes or seeks to confer power not legislative in its nature; or, 2d, because it violates some specific provision of the State or national Constitution." Citing 27 Penn. St., 444; 30 *id.*, 9–37; Sedgwick, Const. Law, 174–'5, 515; 4 Hill, N. Y., 140.

In the brief of Mr. Pond, used in the court below, a copy of which was filed with this court appended to my brief, he said (page 65):

"It is certain that that provision is inconsistent with any power in the legislature to 'establish reasonable maximum rates,' except 'from time to time.' In other words, it negatives the power of the legislature at any session from establishing maximum rates, which it shall be beyond the power of the legislature at its next or any other session to change; yet the statute in question, if held valid, will indirectly accomplish this result. It in effect says that for two

years from any day before such statute is repealed or changed the maximum rate for the transportation of any passenger who elects to pay for that time in advance shall be two cents per mile; and, as my associate pointed out in his argument, if an act should at any time hereafter be introduced into the legislature to increase such maximum, thousands of people might require such maximum to continue as to them for two years after such act should be passed and take effect. In other words, the effect of the act is to fix a maximum charge for two years from any given time in favor of all persons demanding it."

I respectfully submit that the point made by respondent that the act is repugnant to, inconsistent with, and in violation of the State constitution has not been answered by briefs of counsel or the opinion of the court, and as the question is a most important
79 one, and has been fully and fairly presented, fully argued and submitted, it is no more than right that it should be squarely decided one way or the other.

I therefore respectfully ask the court to reconsider the case and give to the question presented the careful consideration it deserves.

GEO. C. GREENE,
*Of Counsel for Respondent.*

By Mr. POND: I desire to add only a few words to what has been said above by my associate, Mr. Greene.

The opinion of the majority of the court discusses the effect of article XIX*a* of the constitution wholly upon the assumption that the sole contention made by counsel for respondent upon that subject was that said section is a limitation upon the power of the legislature, and that its effect is to preclude the legislature from establishing different maximum rates for different circumstances and conditions.

With all due deference, I submit that in this respect the court is in error. No argument of that kind will be found in either of the briefs of the undersigned which were before the court.

Said section is either a grant of power or, as suggested by the quotation contained in the opinion of the majority of the court from Judge Cahill in the Wellman case, "a declaration of an existing power." Whether it is the one or the other was not material to my argument, and hence received no attention from me.

My contention was and is that the act in question must or may interfere with and embarrass future legislatures in the effectual exercise of such power, and hence that said act must be invalid.

That an enactment by one legislature which by its operation must or may restrict or embarrass a subsequent legislature in the exercise of a power vested in the legislative department of the government must be invalid seemed to me when I wrote my
80 briefs mentioned, and seems to me now, too clear to need argument; and hence in such briefs I attempted to demonstrate, and believe I did demonstrate, that the statute under consideration was such as would necessarily embarrass a future legislature in the exercise of the power so given or declared to exist by

said section XIX*a* of the constitution. My argument there is substantially this, to wit, that a subsequent legislature exercising such power may raise a maximum rate prescribed by a former legislature, and it must be presumed it will do so if satisfied that such a rate is unjustly too low; and that the statute in question would operate to embarrass such exercise of such power is clear, for the reason that it compels railroad companies to enter into contracts to carry at a named rate for a period of two years from any given date, say from the day before such increase in the maximum rate takes effect. (See quotation from my brief by Mr. Greene, *supra.*)

It is no answer to this argument to say that no such contracts may be outstanding. In the very nature of things, they will be outstanding. The moment it seems probable that the rate fixed by such act is to be raised or such act repealed, it goes without saying that railroad companies will be called upon to make such contracts; nor is it any answer to say that there is slight, if any, probability that a future legislature will desire to raise such rate or repeal such act. The question is not what is probable; that rests in the womb of the future, and no one can forecast it. It is enough that the power exists, and that the act in question would interfere with its exercise.

Now, I respectfully submit that this argument cannot be characterized as frivolous, and that it demands consideration.

ASHLEY POND,
*Of Counsel for Respondent.*

80½ STATE OF MICHIGAN:

Supreme Court.

HENRY C. SMITH, Relator,
*vs.*
LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

*Application of Respondent for Rehearing.*

LENAWEE COUNTY, *ss:*

Clement E. Weaver, being duly sworn, deposes and says that he is one of the attorneys for respondent in the above-entitled cause; that on the 13th day of October, 1897, at the office of the clerk of the supreme court, he served upon Fred A. Maynard, attorney general of the State, a printed copy of application of respondent for rehearing in this cause by handing the same to him personally.

And deponent further says that on the 14th day of October, 1897, he served a copy of said printed application upon Henry C. Smith, relator, and one of the attorneys of record of said relator, by handing the same to him personally, in the office of Watts, Bean & Smith, in the city of Adrian, attorneys for relator.

C. E. WEAVER.

Subscribed and sworn to before me this 14th day of October, A. D. 1897.

D. B. MORGAN,
*Notary Public in and for Lenawee County.*

81 (*Reply to Application for Rehearing.*)

STATE OF MICHIGAN :

Supreme Court.

HENRY C. SMITH, Relator,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

In the matter of the application of respondent for a rehearing.

We have read with care the respondent's application, and while it does not contain any point not discussed in their brief and replied to in the brief of the relator, we have no reluctance in making some comments and further reply.

The tone of respondent's application would indicate that the learned counsel took it as a personal affront that every one of their points or alleged points have not been taken up and discussed by the court in detail; and they also assert with characteristic positiveness that neither the court nor counsel for relator have made any answer to certain of their propositions, and especially to the one that future legislatures will be tied up and prevented from again changing the maximum rate by the act in question.

We refer the counsel for respondent and the court to our brief on file, pages 52, 53, 54, 55, 56, 57, and 58, for some comments upon this branch of their contention. We also call their attention to our brief, pages 38 to 52, for the discussion of the principles underlying the right of State legislature to pass laws for the control and management of railway corporations, subject only to the requirement of the Constitution that the legislation shall be so
82 reasonable as not to deprive a corporation of the benefit and use of its property; and in this connection we wish to repeat that when the legislature has once acted and declared that certain enactments are useful and beneficial to the general welfare and public interest, that such declaration and conclusion on the part of the legislative branch is conclusive upon the judiciary, and that the judiciary cannot interpose except that such law violates the fundamental principles of government by depriving the individual of some of his inalienable rights, such as life, liberty, the pursuit of happiness, the right of property, and the beneficial use of property, and before the court has a right to interpose it must find affirmatively that the act in question does go to that extent. The judiciary cannot call upon the legislature or the party seeking to enforce the law to point out specifically the particular good to be accomplished by the act in question.

The main point.

But, to return to the main point urged by counsel for a rehearing, we say that the act in question does not prevent such legislature from "time to time" changing the maximum rate and altering and amending the act in question. Indeed, it is not contended but that the rate may be changed by subsequent legislatures as to all tickets sold after the new act takes effect; but it is insisted that if it is attempted to be made to apply by its terms to outstanding tickets, that it will be in violation of the constitution, which forbids the impairing of the obligation of contracts.

It will hardly be disputed, and has not been, but that the legislature might pass a law and exempt from its operations all outstanding tickets; but it is insisted that this will leave one class of tickets with a right to ride at the rate of two cents per mile and another at a greater rate in case the rate increased, and that that will be discriminating. We deny that this will be a law authorizing discrimination in rates, and deny that it will be discrimination; but even if it does discriminate and works injury to certain parties and certain railway companies, still it would fall within the quotation made
83 by us in our former brief, found on page 56, bottom, and 57, top. We again call the court's attention to our suggestion made on page 56 of our brief, in the following language:

"But suppose a change in legislation should be made increasing the rate, and that when it took effect tickets were outstanding. Such tickets would not be voluntary contracts of the railroad company in all respects. The regulations and conditions injected by the direction and command of the legislature would not be the voluntary contract of the railroad company, and it is by no means certain that the legislature, which may increase the rate, might not, at the same time, make provision for the redemption of all outstanding tickets that would be equitable, and yet not compel railroad companies to carry the unused portion of them at the former rate of two cents per mile, without violating that provision of the constitution which prohibits the passing of laws 'impairing the obligations of contracts.'"

After writing the foregoing we found some authorities which seem to us to sustain this contention. We noted them upon the margin of our brief filed, and again refer to them here, viz:

Mumma *v.* Potomic Co., 8 Peters, 281.
Chicago Life Ins. Co. *v.* Needles, 113 U. S., 575.
Crenshaw *v.* U. S., 134 U. S., 99.

It seems to us that every purchaser of a ticket under this act in question purchases it subject to the right of the legislature, when it sees fit, to raise the maximum rates and fix some fair method of outstanding tickets being redeemed without any loss to the holder for the unused portion thereof.

It was held by the three cases above cited that a public law which enters into a contract between private individuals, which is expressly injected into the contract by the public law itself, and not by the voluntary agreement of the parties, is not such a contract as the con-

stitution refers to when it forbids the passing of laws impairing the obligation of contracts.

" In all these cases there can be no contract and no irrepeal-
84 able law, because they are governmental subjects, and hence within the category before stated. They involve public interests, and legislative acts concerning them are necessarily public laws. Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessor. The latter has the same power of repeal and modification which the former had of enactment; neither more nor less. All occupy in this respect a footing of perfect equality. This must necessarily be so, in the nature of things. It is vital to the public welfare that each should be able at all times to do whatever the varying circumstances and personal exigencies touching the subject involved may require. A different result would be frought with evil." Grenshaw *v.* U. S., *supra*, p. 106.

So we say that when the legislature assumes the right to say that a railway corporation shall sell to its patrons a ticket for twenty dollars over one thousand miles of its road and fixes the limit within which it may be used, and does this acting in behalf of the public, as a public matter, the purchaser buys it, taking notice that any subsequent legislature may again change the general maximum rate for such a ticket and at the same time fix some just method of adjustment between himself and the railway company for the redemption of the outstanding part of his ticket without loss to him.

And we insist that the taking away of his future right to the reduced rate which the statute had given him is not impairing the obligation of his contract, both acts of the legislature being based upon the public welfare.

If we keep constantly in mind the fact that this legislation is the public interest, the regulation of public business, there is no difficulty in the matter.

If we keep close to the opinion of Justice Brewer in Budd *v.* N. Y., 143 U. S, cited by us in our former brief, there will be no trouble in disposing of the case.

Justice Brewer says: " The creating of all public highways is a public duty. Railroads are highways. The State may build
85 them. If an individual does the work, he is *pro tanto* doing the work of the State. He devotes his property to the public use."

WATTS, BEAN & SMITH,
*Attorneys for Relator.*

85*a* STATE OF MICHIGAN:

Supreme Court.

HENRY C. SMITH, Relator,
*vs.*
LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

Respondent in this cause asks the court to make the following a part of its decree and order of judgment in the above-entitled cause:

The court orders it to be certified and made a part of the record in this case, and of the order and decree granted herein, that in the decision of this case and rendition of said order and decree it became and was necessary and material to the case to determine whether the act of the legislature of the State of Michigan mentioned in the petition herein, being subdivision 9 of section 9 of article II of the general railroad laws of the State, as amended by act No. 90 of the public acts of 1891, is in violation of or repugnant to article XIV of the Constitution of the United States, which provides: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and also whether said act of the legislature is in violation of or repugnant to the eighth section of article I of said Constitution, which declares that "The Congress shall have power * * * to regulate commerce among the several States;" and also whether said act of the legislature is repugnant to and in violation of article I, section 10, of the Constitution of the United States, which prohibits the State from passing any law impairing the obligation of contracts, it being claimed by the respondent company that said act, if enforced
85*b* against said respondent, would impair the obligation of the contract between the State and the Michigan Southern Railroad Company as embodied and expressed in the charter of the last-mentioned company. The respondent company claimed that the said act was in violation of and repugnant to the said several provisions of said Constitution, but this court held and decided herein against the said several claims so made by said respondent."

Dated October 7, 1897.

ASHLEY POND,
A. C. ANGELL AND
C. E. WEAVER,
*Attorneys for Respondent.*
GEO. C. GREENE, *Of Counsel.*

We consent.
WATTS, BEAN & SMITH,
*Attorneys for Relator.*

Endorsed: Filed November 2, 1897. Chas. C. Hopkins, clerk supreme court.

86 STATE OF MICHIGAN:

The Supreme Court.

HENRY C. SMITH, Relator,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

In the matter of the application for a rehearing.

*Statement of the Attorney General.*

The respondent has applied for a rehearing of this cause. I submit that the opinion of the court rendered upon the hearing, the briefs on the part of relator on the hearing of the case, and the statement of Watts, Bean & Smith, filed in answer to said application for a rehearing, fully answer the points raised and discussed in respondent's application, and that said application should be denied.

Respondent has filed a request in this cause that the court incorporate in its decree and order of judgment the following:

"The court orders it to be certified and made a part of the record in this case and of the order and decree granted herein, that in the decision of this case and rendition of said order and decree it became and was necessary and material to the case to determine whether the act of the legislature of the State of Michigan mentioned in the petition herein, being subdivision 9 of section 9 of article II of the general railroad laws of the State as amended by act No. 90 of the public acts of 1891, is in violation of or repugnant to article XIV of the Constitution of the United States, which provides: 'nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law-;'

87 and also whether said act of the legislature is in violation of or repugnant to the eighth section of article 1 of said Constitution, which declares that 'the Congress shall have power * * * to regulate commerce among the several States;' and also whether said act of the legislature is repugnant to and in violation of article 1, section 10, of the Constitution of the United States, which prohibits the State from passing any law impairing the obligation of contracts, it being claimed by the respondent company that said act, if enforced against said respondent, would impair the obligation of the contract between the State and the Michigan Southern Railroad Company, as embodied and expressed in the charter of the last-mentioned company. The respondent company claimed that the said act was in violation of and repugnant to the said several provisions of said Constitution, but this court held and decided herein against the said several claims so made by said respondent."

Clearly, under the practice of this court, this clause does not and cannot properly form a part of the decree and order of judgment, and I therefore respectfully request that such clause be not made a part of such decree and order of judgment herein.

If respondent believes that there is a Federal question or questions involved in this case, and that this court has acted adversely to its claims upon said Federal question or questions, it is for it to present the matter to the Federal court, and to allow that court to determine as to whether or not such Federal question or questions was actually and necessarily involved and decided adversely to respondent's claims. It is not the practice of this court to assume the existence of such Federal questions, and to make them a part and portion of its decree and order of judgment.

The practice of this court has been in this class of cases to issue its decree and order of judgment in the ordinary form, and not to include therein clauses which state that a Federal question was raised and actually and necessarily decided.

This practice clearly appears from the cases of Detroit City Railway *v.* Guthard, 51 Mich., 180 (114 U. S., 133), and Fargo *v.*
88 Michigan, 57 Mich., 598 (reversed in 121 U. S., 230).

In the case of Detroit City Railway *v.* Guthard the attorneys for complainant and appellee moved the court for a certificate stating that the record in the case presented a Federal question, the decision of which was necessary and material to the issue presented and decided. The court in that case refused to make such a certificate.

Also in the case of Fargo *v.* Michigan the files disclose that the complainant moved the court for a decree stating that a tax of the State had come into question as violating a right, privilege, or immunity of the complainant under the Constitution of the United States, and that the opinion of the court was that said tax did not violate any right, privilege, or immunity of the complainant company. The court refused to incorporate such a clause in the decree, following the ruling in the case of Detroit City Railway *v.* Guthard.

I therefore submit that under the practice of this court as laid down in the two cases last above mentioned the clause contended for by the respondent should not be included in the decree and order of judgment.

Respectfully submitted.

FRED A. MAYNARD,
*Attorney General.*

89 At a session of the supreme court of the State of Michigan held at the supreme court room, in the capitol, in the city of Lansing, on the twenty-third day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Charles D. Long, chief justice; Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, associate justices.

HENRY C. SMITH, Relator,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Appellant.

The application for a rehearing heretofore submitted herein having been duly considered by the court is hereby denied, with costs to the relator.

90 At a session of the supreme court of the State of Michigan held at the supreme court room, in the capitol, in the city of Lansing, on the seventh day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Charles D. Long, chief justice; Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, associate justices.

HENRY C. SMITH, Relator,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Appellant.

The record and proceedings in this cause having been removed to this court by writ of certiorari issued to the circuit court for the county of Lenawee, and the same and the matters and proceedings therein having been examined and duly considered by the court and no error appearing therein, thereupon it is ordered that the order of said circuit court for the county of Lenawee, granting a peremptory writ of mandamus herein, be, and the same is hereby, in all things affirmed.

It is further ordered and adjudged that the relator recover of and from the said respondent his costs, to be taxed, and have execution therefor.

91 And upon motion of counsel for the respondent it is further ordered that it be certified and made a part of the record in this case and of the order and decree granted herein that in the decision of this case and rendition of said order and decree it became and was necessary and material to the case to determine whether the act of the legislature of the State of Michigan mentioned in the petition herein, being subdivision 9 of section 9 of article II of the general railroad laws of the State as amended by act No. 90 of the public acts of 1891, is in violation of or repugnant to article XIV of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law;" and also whether said act of the legislature is in violation of or repugnant to the eighth section of article I of said Constitution, which declares that "the Congress shall have power * * * to regulate commerce among the several States;" and also whether said act of the legislature is repugnant to and in violation of article I, section 10, of the Constitution of the

United States, which prohibits the State from passing any law impairing the obligation of contracts, it being claimed by the respondent company that said act, if enforced against said respondent, would impair the obligation of the contract between the State and the Michigan Southern Railroad Company as embodied and expressed in the charter of the last-mentioned company. The respondent company claimed that the said act was in violation of and repugnant to the said several provisions of said Constitution, but this court held and decided herein against the said several claims so made by said respondent.

92 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the supreme court of the State of Michigan, Greeting:

[Seal of the Circuit Court, Eastern District of Michigan.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Michigan, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henry C. Smith, as relator, and The Lake Shore & Michigan Southern Railway Company, as respondent, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or
93 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Lake Shore & Michigan Southern Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 13th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

WALTER S. HARSHA,
*Clerk of the Circuit Court of the United States*
*for the Eastern District of Michigan.*

Allowed by—
CHAS. D. LONG,
*Chief Justice of the Supreme Court*
*of the State of Michigan.*

94 [Endorsed:] Writ of error. Filed Dec. 13, 1897. Chas. C. Hopkins, clerk sup. ct.

95 UNITED STATES OF AMERICA, *ss:*

To Henry C. Smith, of the city of Adrian, in the county of Lenawee, in the State of Michigan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Michigan, wherein The Lake Shore & Michigan Southern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles D. Long, associate chief justice of the supreme court of the State of Michigan, this thirteenth day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

CHAS. D. LONG,
*Chief Justice of the Supreme Court*
*of the State of Michigan.*

96 STATE OF MICHIGAN, } *ss:*
*Lenawee County,* }

On this 18th day of December, in the year of our Lord one thousand eight hundred and ninety-seven, personally appeared before me, the subscriber, Clement E. Weaver, of Adrian, Lenawee county, Michigan, and makes oath that he delivered a true copy of the within citation to Henry C. Smith, the within-named defendant in error, to deponent well known, at the office of the said Henry C. Smith, in the said city of Adrian, on Thursday, the sixteenth day of December, A. D. 1897, and at the same time the said Henry C. Smith in deponent's presence wrote and signed the following endorsement of acceptance of service.

C. E. WEAVER.

Sworn to and subscribed the 18th day of December, A. D. 1897.

D. B. MORGAN,
*Notary Public.*

I hereby accept service of the within citation and acknowledge the receipt this day of a true copy thereof.
Dated Dec. 16th, 1897.

HENRY C. SMITH.

[Endorsed:] Citation. Filed Dec. 23, 1897. Chas. C. Hopkins, clerk supreme court.

97 Know all men by these presents that we, The Lake Shore and Michigan Southern Railway Company, as principal, and William H. Wells, of Detroit, Michigan, as sureties, are held and firmly bound unto Henry C. Smith, of the city of Adrian, in the county of Lenawee, in the State of Michigan, in the full and just sum of one thousand dollars, to be paid to the said Henry C. Smith, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, in the supreme court of the State of Michigan that being the highest court in said State, in a suit depending in said court between said Henry C. Smith as relator and said Lake Shore and Michigan Southern Railway Company as respondents, a judgment was rendered against the said Lake Shore and Michigan Southern Railway Company, and the said railway company has obtained the allowance of a writ of error to remove the said cause to the Supreme Court of the United States, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Henry C. Smith citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Lake Shore and Michigan Southern Railway Company shall prosecute its said writ to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void else to remain in full force and virtue.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY,
By S. R. CALLAWAY, *President.* [SEAL.]
WM. H. WELLS. [SEAL.]

Sealed and delivered in presence of—

—— ——.

98 Attest: N. BARTLETT, *Ass't Sec'y.*

[Seal Railway Company.]

Approved by—
CHAS. D. LONG,
*Chief Justice of the Supreme Court of the State of Michigan.*

Endorsed: Filed Dec. 13, 1897. Chas. C. Hopkins, clerk supreme court.

99 In the Supreme Court of the United States.

HENRY C. SMITH, Relator and Defendant in Error,
*vs.*
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Plaintiff in Error.

The said respondent, by George C. Greene, its attorney, now comes into the Supreme Court of the United States, and for assignment of errors herein says that in the record and proceedings and in the judgment in said cause there is manifest error in this, to wit:

1. That the supreme court of the State of Michigan erred in holding and determining that the act of the legislature of the State of Michigan mentioned in the petition in this cause, being subdivision 9, section 9, of article II of the general railroad laws of the State of Michigan, as amended by act No. 90 of the public acts of 1891, is not in violation of or repugnant to article XIV of the amendments of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

2. That the said court erred in holding as to respondent
100 that the requirement of said act of the legislature of the State of Michigan that respondent should sell tickets good for the transportation of the purchaser and his family for two years at a rate of fare of two cents per mile is not in violation of or repugnant to article 14 of the amendments of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

3. That the said court erred in holding and determining that the said act of the legislature of the State of Michigan is not in violation of or repugnant to section 8, article I, of the Constitution of the United States, which declares that "the Congress shall have power * * * to regulate commerce among the several States."

4. That the said court erred in holding that the said act of the legislature of the State of Michigan in question, as applicable to this respondent, a corporation existing under a special charter granted by the State of Michigan to it in 1846, mentioned in the opinion of said court, is not in the respects wherein it affects the rights of this respondent under said charter in violation of or repugnant to article I, section 10, of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

5. That the said court erred in holding that the said act of the legislature of the State of Michigan, as applicable to that por-
101 tion of respondent's road which it holds as successor of the Michigan Southern Railroad Company, and which that company acquired by purchase from the State under and by virtue of the contract of bargain and sale contained in the special charter of

that company in 1846, is not in the respects wherein it affects the rights of respondent as to such portion of said road under said charter in violation of or repugnant to said article I, section 10, of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

6. That it appears by the record in said cause that the petition in said cause should have been denied.

7. That the judgment in said cause was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error and against the said defendant in error.

And the said plaintiff in error, for the errors aforesaid and for other errors appearing in the record and proceedings in said cause, prays that the judgment aforesaid may be reversed and held for nothing, and that it may be restored to all things which it may have lost by occasion of said judgment.

GEORGE C. GREENE,
*Attorney for Plaintiff in Error.*

102 [Endorsed:] No. 15585. In the Supreme Court of the United States. Henry C. Smith, relator & def't in error, *vs.* The Lake Shore & Michigan Southern Railway Company, respondent & pl'ff in error. Assignment of errors. Filed Dec. 23, 1897. Chas. C. Hopkins, clerk.

Wells, Angell, Boynton & McMillan, — for —, 704 Union building, Detroit, Michigan.

| | | |
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| 103<br>Henry C. Smith, Relator,<br>*vs.*<br>The Lake Shore and Michigan Southern Railway Company, Respondent and Appellant. | Watts, Bean & Smith.<br>Fred A. Maynard, attorney general.<br>Certiorari to Lenawee. | Ashley Pond, A. C. Angell, C. E. Weaver, George C. Greene, of counsel.<br>Lane, J. |

| Journal. | Date. | Proceedings. |
|---|---|---|
| | 1896. | |
| | May 5 | Petition duly allowed by Long, C. J., filed, and writ issued, ret. May 25, 1896. |
| | " 13 | Return filed. |
| | " 20 | Letter of circuit judge filed. |
| | " 21 | Stipulation for hearing filed. |
| | " " | Note of argument filed. |
| N, 370 | Jun- 19 | Argued and submitted. |
| | 1897. | |
| O, 241 | Oct. 1 | Opinion filed. |
| " 292 | Nov. 2 | Application for rehearing submitted. |
| | " " | Proposed form of judgment filed. |
| | " 23 | Application for rehearing denied. |
| O, 346 | Dec. 7 | Judgment entered, with costs to relator. |
| | " 13 | Writ of error from Supreme Court U. S. filed. |
| | " 13 | Bond filed. |
| | " 23 | Citation, with acceptance of service, filed. |
| | " " | Assignment of errors in Supreme Court U. S. filed. |
| | 1898. | |
| | Jan. 12 | Return made to Supreme Court United States. |

104 Supreme Court of the State of Michigan.

HENRY C. SMITH, Relator,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent.

STATE OF MICHIGAN, *ss:*

In the Supreme Court.

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above-entitled cause by said court, including the written decision and reasons therefor signed by the judges of said court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof; that attached thereto are the writ of error with allowance endorsed thereon, the citation with acceptance of service endorsed thereon, a copy of the bond to the adverse party filed with the writ of error, and the assignment of errors in the Supreme Court of the United States.

Seal of the Supreme Court of Michigan, Lansing.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this twelfth day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

CHAS. C. HOPKINS,
*Clerk of the Supreme Court of the State of Michigan.*

105 In the Supreme Court of the United States.

HENRY C. SMITH, Relator and Defendant in Error,
*vs.*
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Plaintiff in Error.

Please take notice that the record in the supreme court of the State of Michigan in the above-entitled cause has been filed in the said Supreme Court of the United States, and said cause has been docketed No. 565 for the October term, 1897; that the appearance of the undersigned has been entered as attorney of record for plaintiff in error; that the annexed is a statement of the errors on which the plaintiff in error intends to rely, and that the plaintiff in error intends to rely upon the entire record of said supreme court of the State of Michigan in the said cause and intends to request the clerk of the Supreme Court of the United States to print the whole thereof.

GEORGE C. GREENE,
*Attorney for Plaintiff in Error.*

106 In the Supreme Court of the United States.

HENRY C. SMITH, Relator and Defendant in Error,
*vs.*
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Plaintiff in Error.

The said respondent, by George C. Greene, its attorney, now comes into the Supreme Court of the United States, and for assignment of errors herein says that in the record and proceedings and in the judgment in said cause there is manifest error in this, to wit:

1. That the supreme court of the State of Michigan erred in holding and determining that the act of the legislature of the State of Michigan mentioned in the petition in this cause, being subdivision 9, section 9, of article II of the general railroad laws of the State of Michigan, as amended by act No. 90 of the public acts of 1891, is not in violation of or repugnant to article XIV of the amendments of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

2. That the said court erred in holding as to respondent that the requirement of said act of the legislature of the State of Michigan that respondent should sell tickets good for the transportation of the purchaser and his family for two years at a rate of fare
107 of two cents per mile is not in violation of or repugnant to article 14 of the amendments of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

3. That the said court erred in holding and determining that the said act of the legislature of the State of Michigan is not in violation of or repugnant to section 8, article I, of the Constitution of the United States, which declares that "the Congress shall have power * * * to regulate commerce among the several States."

4. That the said court erred in holding that the said act of the legislature of the State of Michigan in question, as applicable to this respondent, a corporation existing under a special charter granted by the State of Michigan to it in 1846, mentioned in the opinion of said court, is not, in the respects wherein it affects the rights of this respondent under said charter, in violation of or repugnant to article I, section 10, of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

5. That the said court erred in holding that the said act of the legislature of the State of Michigan, as applicable to that portion of respondent's road which it holds as successor of the Michigan Southern Railroad Company and which that company acquired by purchase from the State under and by virtue of the contract of bargain

and sale contained in the special charter of that company in 1846, is not, in the respects wherein it affects the rights of respondent as to such portion of said road under said charter, in violation
108 of or repugnant to said article I, section 10, of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

6. That it appears by the record in said cause that the petition in said cause should have been denied.

7. That the judgment in said cause was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error and against the said defendant in error.

And the said plaintiff in error, for the errors aforesaid and for other errors appearing in the record and proceedings in said cause, prays that the judgment aforesaid may be reversed and held for nothing, and that it may be restored to all things which it may have lost by occasion of said judgment.

GEORGE C. GREENE,
*Attorney for Plaintiff in Error.*

109 In the Supreme Court of the United States.

HENRY C. SMITH, Relator and Defendant in Error,
*vs.*
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Respondent and Plaintiff in Error.

STATE OF MICHIGAN, } ss:
*County of Lenawee,* }

Clement E. Weaver, being duly sworn, deposes and says that on the 21st day of January, A. D. 1898, at the city of Adrian, in said county, he personally served upon Henry C. Smith, the relator named in the above entitled cause, by handing the same to him, at his office, in the city of Adrian, a notice, with a true copy of the assignment of errors thereto attached, of which notice and assignment of errors the foregoing are full and true copies.

CLEMENT E. WEAVER.

Sworn to and subscribed before me, at the city of Adrian aforesaid, this 22nd day of January, A. D. 1898.

D. B. MORGAN,
*Notary Public.*

110 [Endorsed:] U. S. Supreme Court. Henry C. Smith, relator & def't in error, *v.* Lake Shore & Michigan Southern Railway Co., respd. & pl'ff in error. Proof service notice filing record, docketing cause, &c., &c. Geo. C. Greene, att'y for pl'ff in error.

111 [Endorsed:] Case No. 16,778. Supreme Court U. S., October term, 1898. Term No., 227. The Lake Shore & Michigan Southern Railway Co., P. E., *vs.* Henry C. Smith. Statement of errors & direction by plaintiff in error that whole record be printed, with notice & proof of service. Filed Jan'y 26, 1898.

Endorsed on cover: Case No. 16,778. Michigan supreme court. Term No., 227. The Lake Shore & Michigan Southern Railway Company, plaintiff in error, *vs.* Henry C. Smith. Filed January 15th, 1898.



No. 227.

FILED
MAR 6 1
JAMES H. McKEN

Brief of Greene for P. E.

# In Supreme Court of the United States.

October Term, 1898.

No. 227.

Filed Mar. 6, 1899.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, . . *Plaintiff in Error,*

AGAINST

HENRY C. SMITH, . *Relator and Defendant in Error.*

## BRIEF OF PLAINTIFF IN ERROR.

GEORGE C. GREENE,
*Of Counsel for Plaintiff in Error.*

IN THE

# Supreme Court of the United States.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR, *vs.* HENRY C. SMITH, RELATOR, DEFENDANT IN ERROR.

## BRIEF OF PLAINTIFF IN ERROR.

ERROR TO SUPREME COURT OF MICHIGAN.

### STATEMENT.

This case comes to this court upon a writ of error to the Supreme Court of the State of Michigan, from the judgment of that court, affirming the order and judgment of the Circuit Court of Lenawee County, which awarded a peremptory writ of mandamus requiring the plaintiff in error "to issue to said relator, upon payment or tender to it, or to its ticket agent in charge of its ticket office, at Adrian, Michigan, of twenty dollars, lawful money of the United States, a thousand-mile ticket, in the name of said Henry C. Smith, and his said wife, as required by the Act of the Legislature of the State of Michigan, mentioned in the petition herein, being Sub-division 9 of Section 9, of Article II, of Chapter 91, of Howell's Annotated Statutes, as amended by Act No. 90, of the Public Acts of 1891. That said ticket shall be good upon and limited to the railway lines operated by respondent within the State of Michigan." (Record, p. 14.)

The case was heard in the Circuit Court upon the petition, answer and reply, which appear in the Record at pages 7, 9, 13, respectively. Therefore, the facts stated in the answer were and are to be taken as true.

The *Petition* (p. 7) stated that respondent is a private corporation, operating a railroad in Michigan and several other States.

That under the statute above referred to, it was its duty to keep for sale at Adrian, "one-thousand-mile tickets at a price not to exceed twenty dollars," and "if required by the purchaser, to issue such tickets in name of such purchaser and his wife, * * * which ticket shall be valid for two years after date of purchase."

That relator tendered to the ticket agent at Adrian, twenty dollars, "and demanded that said agent issue to your petitioner a one-thousand-mile ticket in the name of your petitioner and of his wife, Emma Watts Smith, as provided by the above-mentioned statute," and the agent refused.

It is not alleged that the ticket demanded was to be limited to the State of Michigan, but the demand alleged was broad enough to cover ticket good in all States.

In the *Answer* it is alleged that respondent owns and operates a railroad between Chicago and Buffalo, passing through States other than Michigan, " and also a line of railroad which extends from said first-mentioned railroad at Elkhart, Indiana, to Monroe, Michigan, with a branch line from Lenawee Junction on said line," to the City of Jackson. (Record, p. 9, par. 1.)

It does not appear by the petition, answer or reply that respondent owns or operates in Michigan any other railroad than that above stated and described.

In the answer it is also alleged that all of said railroad formerly belonged to the Michigan Southern Railroad Company, a corporation organized and existing under a special charter, granted by Act No. 113, Laws of Michigan, passed in 1846. Several consolidations are alleged, whereby the respondent company was formed, and it is alleged that thereby respondent acquired and is entitled to hold all the rights, franchises, powers, property and privileges granted in and by said special charter and

acts of the Legislature of Michigan, to said Michigan Southern Railroad Company and the Michigan Southern & Northern Indiana Railroad Company. (Record, p. 10, par. 2, 3, 4, 5.)

Also that under said charter the Michigan Southern Railroad Company had the power and authority to charge, and did charge, for transportation of passengers over its said railroad three cents per mile, and that rate has ever since been maintained, and this respondent has had and still has power and authority to make such charge, and said charter is now in full force and effect, and applies to respondent. (Record, p. 10, par. 6.)

It is also alleged that relator's demand was for a ticket which would entitle him and his wife to transportation over the whole line of respondent's road in and out of the State. (Record, p. 11, par. 7.)

It is alleged that the Act of 1891 has no application to that portion of respondent's line which was owned by the Michigan Southern Railroad Company, or to its lines outside the State of Michigan. (Record, p. 11, par. 9.)

Also, that said act is a regulation of interstate commerce, and in contravention of Article I, Section 8, of the Constitution of the United States. (Record, p. 11, par. 16.)

Also, that said act is so uncertain and indefinite, that it is impracticable of construction or enforcement.

The *Reply* states that relator does not understand or claim the statute regulates the rate of charge or kind of ticket he shall have or use outside of Michigan, and only asks that the respondent comply with it in Michigan. (Record, p. 13.)

The case was heard upon the pleadings, no proofs being offered.

The Circuit Court granted the writ of mandamus and its decision appears in full at page 14 of the Record.

A writ of certiorari issued from the Supreme to the Circuit Court, and the judge of the latter made his return, which appears at page 16 of the Record.

The cause was argued and submitted in the Supreme Court, in June, 1896, and decided in October, 1897, by a divided court, three judges being in favor of and two against affirmance.

The opinion of the majority (Record, pp. 19–28) being silent upon the question arising under the State Constitution, which was presented and argued at length by counsel, and discussed in the dissenting opinions (Record, pp. 29–41), the defendant company filed its petition for a rehearing. (Record, pp. 42–48.)

The Court denied the application, without delivering any opinion (p. 55).

The Supreme Court ordered and adjudged that the order of the Circuit Court be affirmed (p. 55); and also ordered that it be certified and be made a part of the record and decree that in the rendition of such order and decree it became and was necessary and material to the case to determine whether the Act in question is in violation of or repugnant to Article XIV, or the Eighth Section of Article I, or the Tenth Section of Article I, of the Constitution of the United States, and that the respondent claimed the Act was in violation of and repugnant to such constitutional provisions, but the Court held and decided against such claims (p. 55–6).

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So much of the Charter of the Michigan Southern Railroad Company and other acts of the Michigan Legislature as may be material in the consideration of the case, appear in the Appendix to this brief, and are hereinafter referred to.

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The Constitution of Michigan, Article XIX, A, Section 1, is in the following words:

"Section 1. The legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight

on different railroads in this State, and shall prohibit running contracts between such railroad companies whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersecting lines of railroads."

The Act of 1891, in question, *first establishes maximum rates* for the transportation of passengers, and then goes farther, as follows: (App. p 37.)

"*Provided, further*, That one-thousand-mile tickets shall be kept for sale at the principal ticket offices of all railroad companies of this State or carrying on business partly within and partly without the limits of this State, at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula. Such one-thousand-mile-tickets may be made non-transferable, but whatever required by the purchaser, they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one-thousand-mile ticket shall be forfeited to the railroad company. Each one-thousand-mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used."

## Specification of Errors.

The errors assigned in the Record (p. 59–60), upon which the plaintiff in error relies, are as follows:

1. That the Supreme Court of the State of Michigan erred in holding and determining that the act of the Legislature of the State of Michigan mentioned in the petition in this cause, being Subdivision 9, Section 9, of Article II of the General Railroad Laws of the State of Michigan, as amended by Act No. 90 of the public acts of 1891, is not in violation of or repugnant to Article

XIV of the amendments of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

2. That the said Court erred in holding as to respondent that the requirement of said act of the Legislature of the State of Michigan that respondent should sell tickets good for the transportation of the purchaser and his family for two years at a rate of fare of two cents per mile is not in violation of or repugnant to Article 14 of the amendments of the Constitution of the United States, which provides, "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor to deny any person within its jurisdiction the equal protection of the law."

3. That the said Court erred in holding and determining that the said act of the Legislature of the State of Michigan is not in violation of or repugnant to Section 8, Article I, of the Constitution of the United States, which declares that "the Congress shall have power * * * to regulate commerce among the several States."

4. That the said Court erred in holding that the said act of the Legislature of the State of Michigan in question, as applicable to this respondent, a corporation existing under a special charter granted by the State of Michigan to it in 1846, mentioned in the opinion of said Court, is not in the respects wherein it affects the rights of this respondent under said charter in violation of or repugnant to Article I, Section 10, of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

5. That the said Court erred in holding that the said act of the Legislature of the State of Michigan, as applicable to that portion of respondent's road which it holds as successor of the Michigan Southern Railroad Company, and which that company acquired by purchase from the State under and by virtue of the contract of bargain and sale contained in the special charter of that company in 1846, is not in the respects wherein it affects the rights of the respondent as to such portion of

said road under said charter in violation of or repugnant to said Article I, Section 10, of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

6. That it appears by the record in said cause that the petition in said cause should have been denied.

7. That the judgment in said cause was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error and against the said defendant in error.

And the said plaintiff in error, for the errors aforesaid and for other errors appearing in the record and proceedings in said cause, prays that the judgment aforesaid may be reversed and held for nothing, and that it may be restored to all things which it may have lost by occasion of said judgment.

## POINTS AND ARGUMENT.

### FIRST POINT.

**The statute sought to be enforced is in violation of the provision of the Fourteenth Amendment of the Constitution of the United States, which declares that no State shall deprive any person of liberty or property without due process of law.**

The right and privilege of contracting is both a liberty and a property right.

The act attempts to compel railroad companies to agree to part with their property and services at a fixed rate, at a date in the future when such fixed rate may be wholly unremunerative and a greater rate may be authorized by law; in other words, to agree to part with their property and render service without reference to its value at such future time.

The contracts the company is required to enter into are property. They represent the right to use the road and demand and receive from the company services of value, not only by the person applying for the ticket but other persons unknown to the company.

If partly unused, they still have a cash value, which the company is required to pay therefor.

If the company should retire from business before the expiration of the time specified in the contract, it would still be liable upon it, and bound to perform. The option to cancel the contract is only given to the person holding the ticket, and at his option only may the company purchase or redeem the unused portion.

If by statute the company may be compelled to enter into contracts to grant the use of its property and perform services at a fixed rate for a term of years, it may likewise be compelled to grant to individuals the use of any of its property for any length of time and upon such terms as the legislature sees fit to impose.

I insist that the legislature has no power to require a railroad company *to enter into a contract* the effect of which may be to deprive the company of the right to charge and receive the maximum rates, in all cases, which may be established from time to time, or modified at any time the legislature may see fit to act.

The power to require corporations to enter into executory contracts with its patrons, binding it to perform certain service for a term of years, at a fixed rate, vastly exceeds the power to simply establish maximum rates.

If this act is upheld, it must follow that the legislature has power to require and compel railroad companies to enter into contracts with shippers to transport their freight for a term of years to come, at a fixed rate, and the companies would be bound by such contracts, although, before the expiration of the contract period, rates were greatly increased by the legislature.

The companies may *voluntarily* enter into contracts for transportation of persons and property running for such time as may be agreed upon, keeping within the rates fixed by law, and not unjustly discriminating, but *they cannot be compelled* to enter into such contracts. They discharge their whole duty, which may be or is imposed by law, when, upon payment of the established rate or fare, they receive and in due season transport the person or property to its destination. What to-day may be a reasonable rate, may, a year hence, be unremunerative, and there is no power in one legislature to so establish rates or fares in any case by requiring the companies to enter into contracts, or otherwise, or as between any individual and any company, that it or a subsequent legislature may not, at any time and from time to time, change them.

The effect of the act, if valid, would be to compel the railroad company to bind itself *by contract* with individuals not to avail itself of the benefits of subsequent legislation or of the constitutional provision conferring upon the legislature the power to *from time to time* establish rates, and the legislature would be unable to relieve the company from the obligation of the contract. It would deprive the company of the liberty to contract in relation to the service for the two years covered by the ticket.

The counsel for the relator in the briefs filed in the court below conceded, and I submit it cannot be controverted, that if he was right in his contention, then the legislature can require railway companies to make executory contracts to be performed in the future, running for a period of ten, twenty or thirty years; modified only "by the condition that the time fixed must always be within the bounds of reasonable discretion," or "provided such period is not beyond the bounds of reasonable legislative discretion."

He also conceded that, if he was right, the legislature can compel companies to make express contracts running

into the future for the transportation of freight, and that "such power is only limited by the bounds of reasonable legislative discretion."

This is equivalent to declaring that the legislature has absolute and unlimited power to require companies to enter into such contracts for such rates and periods of time as to the legislature shall seem reasonable. A more despotic or arbitrary power it is hard to conceive.

In Allegeyer *vs.* Louisiana, 165 U. S. 578, it was held:

"The liberty mentioned in that amendment (14th) means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to *embrace the right of the citizen to be free* in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose *to enter into all contracts which may be proper, necessary and essential* to his carrying out to a successful conclusion the purposes above mentioned."

In People *vs.* Marx, 99 N. Y. 386, the Court (Rapallo, J.) says:

"And the Fourteenth Amendment to the Constitution of the United States provides that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than to refer to the conclusions which have been reached bearing upon the question now under consideration. Among these no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. (Live Stock Association *vs.* The Crescent City, etc., 1 Abb. (U. S.) 398; Slaughter House cases, 16 Wall. 106; Corfield *vs.* Coryell, 4 Wash.

C. C. 380; Matter of Jacobs, 98 N. Y. 98.) The term 'liberty,' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but it is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such *restraints* as are necessary for the common welfare. In the language of Andrews, J., in Bertholf *vs.* O'Reilly, 74 N. Y. 515, the right to liberty embraces the right of man 'to exercise his faculties and to follow a lawful avocation for the support of life,' and as expressed by Earl, J., in *In re* Jacobs, 'one may be deprived of his liberty, and his constitutional right thereto violated, without the actual restraint of his person. Liberty in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.'"

Can it be said that a law which *compels* a citizen *to enter into a contract* of service, running through two years, does not interfere with such liberty?

If the law should be repealed the day after the contract, in pursuance of its requirements, is executed, and another law enacted which would entitle the citizen to receive greater compensation for his service, he would still be bound by the contract he had made, and his liberty to contract be denied him.

The right of railroad companies to make reasonable regulations and contracts in relation to their business is supported by an unbroken line of authorities, and such right is subject to certain limitations, restrictions or prohibitions, but nowhere has it been held that the State has the power to compel companies to make such contracts as are required in this case.

In Elmore *vs.* Sands, 54 N. Y. 512, it was held "that a railroad company has a right to provide and insist that its passenger tickets shall be used upon the day when issued." "Whether a ticket is to be regarded as evi-

dencing a contract, or as a token or voucher for the payment of fare only, the effect is the same." "Railroad companies carrying passengers have the right to make reasonable rules and regulations for conducting their business."

In Barker *vs.* Coffin, 31 Barb. (N. Y.) 556, it was also held, and among the reasons assigned in support of the holding are, that unless the company has this right it will have no means to protect against overloading, and the right of passage may be claimed by such numbers on a particular day or occasion as to render it impossible for the carrier to perform his contract. "The contract for passage may be made at a time when the fare by the stage or *cars is very low and its execution claimed* at a future time *when the reasonable fare is much higher.*"

To the same effect see:

State *vs.* Campbell, 32 N. J. L. 309.
B. & L. R. Co. *vs.* Proctor, 1 Allen, 267.
Bawitzky *vs* R. Co., 40 L. Ann. 50.

In the last case cited the Court say: "All the writers on railroad law, and numerous decisions of the courts of the country, concede the right of common carriers to include such restriction in their contracts for the transportation of passengers."

In Dietrich *vs.* Penn. R. Co., 71 Pa. St., the Court say: "The authorities, as well as the reason of the thing, show that the company must make its own regulations."

In Pennington *vs.* Phil., W. & B. R. Co., 62 Md. 95, it is said: "A passenger has a right to be conveyed in the cars of a railroad company without making any special contract for transportation. Upon payment of the usual fare the company is bound to convey him, and is under all the obligations imposed by law on common carriers so far as they relate to the transportation of him as a passenger. *It is competent to vary these obligations by a special* agreement, on valuable consideration, between the passenger and the company. *But if the passenger chooses*

*to do so he may stand on his legal rights* and elect to be carried to his destination without making any special contract. Before the ordinary liability of the railroad company can be varied there must be a consent of the purchaser, founded on a valuable consideration. The ticket is ordinarily only a token showing that the passenger has paid his fare."

This case quite clearly states the rights and duties of the railroad company as a common carrier of passengers. It is bound to receive and carry the passenger within a reasonable time upon receiving payment therefor (Hutchinson on Carriers, section 538); but if a different or other duty or condition is to be imposed upon the carrier or passenger it must be by contract, which passenger or carrier may or may not make at their election.

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**If the legislature can require railroad companies to make such contracts, it can require natural persons to do so.**

In the court below relator's counsel controverted this proposition upon the ground that as to railroad companies the Constitution authorizes the legislature to fix maximum rates, while there is an absence of such provisions as to individuals. If he stands on the constitutional provision as to railroads, it is respectfully submitted that *it* does not give the legislature power to require such executory contracts but only to fix maximum rates. If he stands on the inherent powers of the legislature, how can he distinguish between the right to exercise this power against a railroad company or an individual who is engaged in the business of a common carrier or any other business charged with a public interest? The authorities do not make such distinction.

In Peck *vs.* Ch. & N. W. R. Co., 94 U. S. 165, referring to Munn *vs.* Ill., it is said:

"Where property has been clothed with a public interest the legislature may *fix a limit* to that which shall in law be reasonable for its use."

This rule applies to individuals as well as corporations, as was held in the Munn case, and it is as far as any courts have ever gone in declaring the power of the legislature. No case has been cited, nor, I think, can be found, where it has been held that the legislature could compel the owner or operator of mill, elevator, ferry, stage coach, or railroad, to *enter into a contract* to perform service for a term of years at a fixed rate of compensation.

The legislature or State has no power to compel the citizen or aggregation of citizens forming the corporation to continue in the particular business or to contract to do so.

The act in question in effect requires the railroad companies to agree to continue in the business, so as to perform the contract for at least two years.

Without here questioning the power of the legislature to limit the charge for services rendered in a public employment, or for the use of property in which the public has an interest, I insist that that is the extent of its power in that behalf, and it has no power to go beyond and compel any person or corporation to agree to continue business at the prices fixed, or otherwise. Certainly not where the Constitution of the State, as here, provides that the legislature may *at any time* change or increase the lawful rates.

In Chicago, etc., R. Co. *vs.* Iowa, 94 U. S. 155, 161, Chief Justice Waite, in delivering the opinion of the Court, distinctly holds that an individual engaged in a public employment affecting the public interest, is subject to the same legislative control as is a railroad company. *That the company has power to contract in reference to its business the same as private individuals. That is in substance its charter, and to that extent it is protected*

*as by a contract, and that it is too late to contend the charter is not a contract within the meaning of the clause of the Constitution which prohibits a State from passing a law impairing the obligation of a contract.* That the "company, in the transaction of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and charge only a reasonable sum for the carriage."

The relator's counsel sought to bring to his support the principle that "the legislature has all the incidental and instrumental powers necessary and proper to carry into effectual execution all the express powers," but he does not tell us how or why in order to "establish maximum rates from time to time," it is necessary to require that the companies must enter into contract to adhere to such rates for a term of years, regardless of what maximum rates, fixed by the legislature, may be from time to time during the term.

By the first part of the act in question the legislature establishes maximum rates, but by the provisions in question, which follow, it requires the companies to enter into contracts binding them to accept less than the minimum rate, for two years.

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**The power here sought to be exercised is not legislative in its nature, nor within the scope of legislative authority.**

In Commonwealth *vs.* Maxwell, 27 Pa. St. 444, it was held:

"A law that is unconstitutional, is so because it is either an assumption of power not legislative, or because it is inconsistent with some provision of the Federal or State Constitution."

In Hanson *vs.* Vernon, 27 Iowa, 28 (1 Am. Rep. 215), Dillon, J., says:

"It is a well-settled principle of American Constitutional Law that an act of the legislature may be unconstitutional in two ways: 1st, because it *assumes* or seeks to confer power *not legislative* in its nature; or, 2d, because it violates some specific provision of the State or National Constitution."

Citing 27 Pa. St. 444, 30 Id. 9–37; Sedgwick Const. Law, 174–5, 515; 4 Hill, N. Y. 140.

In Taylor *vs.* Porter, 4 Hill, 140–143, Bronson, J., says:

"*The power of making bargains for individuals has not been delegated to any branch of the government. It is not to be presumed that such a power exists, and those who set it up should tell where it may be found.*"

"Under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the State who transcends his jurisdiction, are utterly void. Where, then, shall we find a delegation of power to the legislature, to take the property of A and give it to B, either with or without compensation? Only one clause of the constitution can be cited in support of the power, and that is the first section of the first article, where the people have declared that the 'legislative power of this State shall be vested in the senate and assembly.' It is readily admitted that the two houses, subject only to the qualified negative of the governor, possess all the legislative power of this State; but the question immediately presents itself, what is that 'legislative power,' and how far does it extend? Does it reach the life, liberty or property of a citizen who is not charged with a transgression of the laws, and when the sacrifice is not demanded by a just regard for the public welfare? In Wilkinson *vs.* Leland (2 Peters, 657), Mr. Justice Story says: 'The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the

power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention.' He added: "We know of no case in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power in any State in the Union On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced.' (See also 2 Kent's Com. 13, 340, and cases there cited.) The security of life, liberty and property, lies at the foundation of the social compact; and to say that this grant of 'legislative power' includes the right to attack private property is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consideration had clothed the legislature with despotic power; and such is the extent of their authority, if they can take the property of A, either with or without compensation, and give it to B. 'The legislative power of this State' does not reach to such an unwarrantable extent. Neither life, liberty nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of the power."

"*Due process of law* means more than a special act passed for the very purpose of deprivation; it means the general law in its regular course of administration through the courts of justice, a law which hears before it condemns, proceeds upon inquiry, and renders judgment only on trial."

Clarke *vs.* Mitchell, 64 Mo. 564.

"If it has no broader meaning than process prescribed by act of the legislature, it is the end of the case. But such a construction would render the constitutional guar-

antee mere nonsense; for it would then mean no State shall deprive a person of life, liberty or property unless the State shall choose to do so."

*In re* Ziebold, 19 Rep. (U. S. Cir.) 742.

Conceding the right of the legislature to prohibit the making of unreasonable contracts, yet it does not follow that it has the right to require us to enter into contracts.

"There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American States. A statute which violates any of these rights is unconstitutional and void, even though the enactment of it is not expressly forbidden. * * * The right to acquire, possess and protect property includes the right to make reasonable contracts, which shall be under the protection of the law."

Commonwealth *vs.* Perry, 115 Mass. 117.
Wheeling Bridge and Terminal R. R. R. Co. *vs.* Gilmore, 8 Ohio C. C. R. 658.

In Braceville Coal Co. *vs.* The People (Ill. Sup. Ct.), 35 N. E. Rep., 62, 63, it is said: "Property in its broader sense is not the physical thing which may be the subject of ownership, but is the right of dominion, possession and *power of disposition* which may be acquired over it. * * * *The privilege of contracting is both a liberty and a property right.*"

"In a broader sense, a right of action is property; *so is a mere right to use or possess*, if it be a right as against the general owner, but is usually termed *special property* to distinguish it from the right of the general owner which is termed the general property. The entire property is the exclusive right of possessing, enjoying and disposing of a thing."—Century Dict.

*Property* is defined to be "any object of value that a person may lawfully acquire or hold; anything that may be owned."—Standard Dict.

The relator's counsel below, in support of his contention, referred to the power of the legislature to establish

the rate of interest, as being a like exercise of power. It doubtless has that power, as it also has power to establish maximum rates for transportation, but to maintain his position he must also maintain that the legislature has power to require and compel banking corporations, creatures of its creation, to enter into contracts with individuals that for a term of years they will loan them moneys and will charge only a specified rate of interest upon such loans, regardless of the maximum rate, which may be fixed from time to time by act of legislature. There is nothing in the laws fixing the rate of interest that would interfere with the right of parties to contract for payment of the rate of interest upon loans established at the time of making the contract, or which might be there, after fixed by law, but here the railroad company is required to contract at the rate now fixed, and cannot have the benefit of an increased rate, subsequently established, nor of the maximum rate established by law in case the mileage clause of the statute should be repealed. The laws regulating interest do not require or compel banks to loan money at the prescribed rate, and it is not within the legislative power to do so. It may say they shall not charge for use of their money rates of interest exceeding those established by law, and so it may say that railroad companies shall not charge for the use of their property or their service more than the maximum rates established by law, and that is the limit and extent of its power in that behalf.

I beg to submit, in addition to the foregoing upon this point, the following from the brief of Mr. Ashley Pond in this case, in the State Supreme Court:

"THE STATUTE OF 1891 IS UNCONSTITUTIONAL AND INVALID.

"It is an attempt on the part of the legislature to compel railroad companies to enter into express contracts to be performed in the future at any time within two years, at the option of the other party to the contract. Now,

"1. If the legislature can require railroad companies to make express contracts, running for a period of two years, it can require them to make contracts running for a period of ten years, or twenty years, or thirty years.

"2. If the legislature can require railroad companies to make express contracts running into the future for the transportation of passengers, it can require them to make like contracts with reference to the transportation of freight.

"3. If the legislature can require railroad companies to make contracts running into the future, it can require natural persons to do so.

"It may be contended in answer to this proposition, that the power which a legislature possesses to require railroad companies to make contracts of the kind under consideration, springs from the power reserved to alter, amend or repeal the charters of such companies or the laws under which they are organized.

"Now, if this were true, for a reason already stated, to-wit: that the charter of the respondent company is not subject to amendment or repeal, except upon payment of damages, it could have no application here.

"But the proposition is not true.

"The power of the legislature to legislate with reference to rates which railroad corporations shall charge for carrying their passengers or freight, does not grow out of the fact that such corporations are created by the legislature, but out of the fact that the public is interested in the business which such corporations carry on.

Munn *vs.* Ill., 94 U. S. 113.

"Now the public is just as much interested in the business of a common carrier when carried on by a natural person, as it is interested in such business when carried on by a person created by the legislature; and it follows, therefore, as I have above suggested, that if the legislature can compel a corporation to enter into a contract with

reference to transportation of passengers or freight, it can compel a natural person carrying on the business of a common carrier, to do the same.

"But to compel a person to enter into a contract for future action on his part of any kind is *not a governmental function*, and hence the legislature has no more power in that regard than it would have if its existence were negatived by an express provision of the constitution.

"Apt, in this connection, is the language of Black, C. J., in Sharpless *vs.* Mayor, 21 Penn. St. 165:

"'I do not say, however, that a contract between two individuals, or between two corporations, can be made by the legislature. Besides, it would be impossible in the nature of things, for the essence of a contract is the agreement of the parties.'"

## SECOND POINT.

**The Act of 1891 in question is in violation of Article I, Section 10 of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, if, as was held by the court below, it applies to the railroad formerly held by the Michigan Southern Railroad Company under its special charter.**

**That charter was a contract between the State, the vendor of the railroad, and the Michigan Southern Railroad Company, the purchaser.**

**The plaintiff in error is the successor of that company, and has acquired and is possessed of all the rights, powers and privileges to which that company was entitled under such charter and contract, among which was, and is, the right to charge and receive three cents per mile for transportation of a passenger over said road.**

**According to the express provisions of said charter it could only be amended after thirty years from its passage by a two-thirds vote of both**

**branches of the legislature, and compensation by the State for all damages sustained by reason of the amendment.**

The facts above stated are expressly alleged in the answer and not denied, but stand admitted upon the record.

It is respectfully submitted that such admission is conclusive as to the facts in this case; but should it be held otherwise, then it is insisted that an examination of the statutes, in connection with the averments contained in the answer in relation to the consolidations, will show that the facts are as above stated, and the conclusions well founded.

From the statutes the following appears:

The Charter of the Michigan Southern Railroad Company (App. p. 1) was passed May 9, 1846, and provided (Sec. 2) that that company shall have the right to *contract with* and purchase from *the State* all the right, title and interest of the State in the Southern Railroad, etc., for the sum of $500,000, to be paid by the company as therein provided.

Section 11 (App. p. 7) provided that the company "shall have power to charge for tolls and transportation such sums as shall be lawfully established by the by-laws of said company, not exceeding the rates charged upon said Southern Railroad on the first day of January last." (It is alleged in the answer (p. 10, Record) and not denied, that such rate for transportation was, and ever since has been, three cents per mile.)

Section 15 (App. p. 9) provided that "it shall and may be lawful for the said company, from time to time, to fix, regulate and receive the tolls and charges taken for the transportation of property and persons on said railroad. * * * *Provided*, said company shall charge no greater sum or tolls for the transportation of persons or property than were charged and authorized by the State of Michigan to be taken on the Southern Railroad on the first day of January last."

" * * * and the rights and franchises vested, or which may vest in said company under or by virtue of this act, shall not in any manner be prejudiced or affected save as herein provided, or by judicial proceedings, or by a repurchase of said railroad, to be made by the State in manner aforesaid:" (App. p. 12.)

Section 31 (App. p. 10) provided that the company shall pay a specified tax and "the real and personal property and effects of said company shall, in consideration thereof, be exempt from all and every other tax, charge or exaction by virtue of any laws of this State now or hereafter to be in force, except penalties by this act imposed."

Section 34 (App. p. 10) provided that the State may after 1867 purchase and take from the company said railroad and property upon terms therein stated.

Section 37 (App. p. 13). "The State reserves the right at any time after thirty years from the passage of this act, by a vote of two-thirds of each branch of the legislature, to alter, amend or repeal the same: *Provided*, the said company shall be compensated by the State for all damages sustained by reason of such alteration, amendment or repeal."

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In support of my contention upon this point, I beg first to submit the following extract from the brief of Mr. Pond on behalf of the Railway Company, in the court below:

"The provisions of the charter of the Michigan Southern Railroad Company, in relation to rates and fares, are still in force and effect, and apply to the railroad formerly held and owned by that company, and to this respondent who has acquired and succeeded to all the rights, privileges and franchises of that company under said charter.

"It appears by respondent's answer that it owns and operates its line of road in Michigan, which runs through Adrian where relator resides and where the demand was made for the issue of the ticket in question, under a special charter granted by the legislature of Michigan. That such charter ran to the Michigan Southern Railroad Company and was granted in connection with the sale of the said road by the State to said company.

"The provisions of such charter were therefore, as I submit, in the nature of terms of such sale and purchase, *i. e.*, the grant of rights, privileges and franchises made to said company by such charter was not voluntary, but for a consideration paid by such company.

"Now, by the terms of such charter, section 15 (see Session Laws of 1846, p. 184), it is provided as follows, to wit:

"'It shall and may be lawful for said company from time to time to fix, regulate and receive the tolls and charges taken for transportation of property and persons on said railroad as aforesaid. * * * * * Provided said company shall charge no greater sums for the transportation of persons and property than were charged or authorized by the State of Michigan to be taken on the Southern Railroad on the first day of January last.'

"And the only method provided in the act for modifying or taking away the rights, privileges or franchises granted by such a charter is found in a reservation of a right to alter, amend or repeal such charter. Such right is reserved to the legislature by section 37 of the act (see Session Laws of 1846, p. 194) which reads as follows:

"'The State reserves the right at any time after thirty years from the passage of this act, by a vote of two-thirds of each branch of the legislature, to alter, amend or repeal the same. Provided the said company shall be compensated by the State for all damages sustained by reason of such alteration amendment or repeal.'

"Now, the Court will take judicial notice of the fact that the State has never exercised the right so reserved; and hence I submit that if this charter is still in force and the respondent entitled to its benefit, the act in question, which undertakes to fix a rate for the transportation of passengers, is invalid.

"That the charter is still in force I think is beyond reasonable question.

"No attempt has been made to repeal it, and no attempt to alter its terms, except by the act here under consideration, and that act makes no provision for the payment of damages, and, therefore, cannot be held to be an exercise of the power of alteration reserved.

"It will, however, undoubtedly be contended on behalf of the relator that the said Michigan Southern Company, by entering into the consolidations mentioned in respondent's answer, which have resulted in the organization known by respondent's name, surrendered such charter and became organized under the general railroad law of this State.

"But such contention, I submit, cannot be successfully maintained.

"The first consolidation mentioned in the answer was of said Michigan Southern Company with the Northern Indiana Railroad Company, and was entered into by virtue of a special act of the legislature of Michigan.

"This act authorized the consolidated company to be called the Michigan Southern & Northern Indiana Railroad Company, and provided as follows:

"'And all franchises, property, powers and privileges now enjoyed by the Michigan Southern Railroad Company * * * * shall appertain to said new corporation, in the same manner as if the same had been contained in or acquired under an original charter or made by or with the consolidated corporation.' (Session Laws of 1855, p. 301.)

"I submit that it is too clear for argument that by entering into this consolidation under this statute, said Michigan Southern Company did not surrender any of the franchises, property, powers or privileges so conferred upon it by such special charter.

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"The next consolidation, so far as the State of Michigan is concerned, it will be contended and may be, for the purpose of this argument, assumed, was under the authority of the so-called General Railroad Law of this State.

"This law, after providing the proceedings to be taken to perfect a consolidation, contains the following provision:

"'And all and singular the rights and franchises of each and all of said two or more corporations, parties to such agreement, and all and singular their rights and interests in and to every species of property and things in action, shall be deemed to be transferred to and vested in such new corporation * * * and such new corporation shall hold and enjoy the same * * * in the same manner and to the same extent as if said two or more corporations * * * should have continued to retain the title and transact the business of such corporations.'

"It will be noticed that the corporations authorized to consolidate under this act were railroad companies within and without the State, whose lines connected in a manner described in this act.

"It is material, therefore, to note in this connection that under said act:

"(1.) Two or more railroad companies organized under such act and whose railroads are wholly within the State, and which companies would have exactly similar rights and franchises, may consolidate.

"(2.) A company organized under such act may consolidate with a company existing under special charter granted by the legislature of said State, and possessing by virtue of such charter franchises, rights and privileges different from and more liberal than those possessed by the former of said corporations.

"(3.) Two or more corporations, existing under special charters from the same State, may consolidate under the authority of a general law, which law is subject to amendment and repeal.

"(4.) A corporation organized and existing under a special charter from the legislature of said State may consolidate with a corporation or corporations existing under the laws of another or other States.

"As to the first of these cases above suggested, it is evident that the corporation consolidating would possess exactly similar franchises, rights and privileges, and that the new organization or corporation produced by the consolidation would have the franchises, rights and privileges, and only the franchises, rights and privileges, granted by such statute to corporations primarily organized under it, and such franchises, rights and privileges would be subject to modification or withdrawal by the exercise by the legislature of the right reserved to it by the constitution to alter, amend or repeal all laws which it may pass for the organization of corporations. And hence the legal principles which would apply to such a consolidation can have no application to the question here under consideration.

"As to the second case suggested, to wit, the consolidation of a corporation organized under the general law, and a corporation existing under special charter granted by the legislature of this State and possessing franchises, rights and privileges more or less liberal than those possessed by the former of said corporations.

"Questions as to the effect of the consolidation of two such corporations have in several instances been before the courts, with the result of decisions which seem to me not quite consistent, but it is unnecessary to attempt to reconcile such cases here. However, in passing, I may call attention to two cases decided by the Supreme Court of the United States.

Tomlinson *vs.* Branch, 82 U. S. (15 Wall.) 460.

"In this case two railroad companies existing under special charters from the State, by the terms of the charter of one of which companies its property was exempt from taxation, and by the terms of the charter of the other its property was not so exempt, were consolidated, and the question arose as to whether by such consolidation the property of the former company had ceased to be so exempt.

"It was held that it had not. Paragraph 3 of the syllabus reads as follows:

"'Where two railroad companies are consolidated the presumption is that each of the two united lines of road will be respectively held with the privileges and burdens originally attaching thereto unless the contrary is expressed.'

Central R. Co. *vs.* Ga., 92 U. S. 665.

"The controversy was as to the effect of a consolidation by two railroad companies existing within and under the laws of the same State under a statute authorizing the same. First paragraph of syllabus reads:

"'The consolidation of two companies does not necessarily work a dissolution of both, and the creation of a new corporation.

"'Whether such be its effect depends upon the legislative intent manifested in the statute under which the consolidation takes place.'

"As to the effect of the consolidation of two corporations existing under special charters from the same State, the question as to whether the result would be a new corporation would depend upon the intention as shown by the statute authorizing such consolidation.

Citizens Street R. Co. *vs.* Memphis, 53 Fed. Rep. 715.

"The fourth case above suggested is the case which we have here, to wit, a Michigan corporation, existing under a charter granting to it rights and privileges different from those granted by the general railroad law to corporations organized under it, and with no power reserved to the legislature to take away any such rights and privileges except upon payment of damages, consolidates, under authority given in that behalf by such general law, with corporations existing under the laws of another or other States.

"Now this being the situation, it seems difficult to understand how such Michigan corporation can be held to

have surrendered such charter and become a corporation organized under such general law and the authorities negative any such result, to wit:

State Treas. *vs.* Aud. Gen'l, 46 Mich. 224.

"This was an application for a mandamus to compel the Auditor General to assess taxes against the respondent company upon the basis of a general railroad law, the theory of the relator being that by consolidating with other companies under the authority of the general railroad law, the Michigan Southern Railroad Company had surrendered its special charter and become formed or organized under such general law, and therefore subject to taxation under it.

"This contention was not sustained. Cooley, J., in the course of the opinion, says: 'Had all the consolidated companies been corporations of this State, possessing like powers, privileges and immunities, and had they proceeded to consolidate under the act of 1873 (the general railroad law), there would have been little or no difficulty in saying that they thereby ceased to exist, and were consolidated into one corporation formed under the provisions of that act.'

"Proceeding with the discussion, Justice Cooley reaches the conclusion that the Lake Shore & Michigan Southern Railway Company is not a corporation formed under the laws of Michigan, but under the laws of Michigan and several other States, and that therefore it is not a corporation formed under said general railroad law.

"He does not, however, in terms determine the question whether or not the Michigan element of that corporation still continues to exist under the special charter granted to it under the name of the Michigan Southern Railroad Company, although such is the result of his reasoning; but in the case which I cite immediately following this he logically settles that question, to wit:

C. & N. W. R. Co. *vs.* Aud. Gen'l, 53 Mich. 79.

"At page 91 he discusses the nature of an organization which was formed by the consolidation of two or more corporations which have received their corporate powers from different sovereignties and upon that subject uses the following language:

"'There may be separate consent (by different sovereignties), given for the consolidation of corporations separately created, and when the two unite they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed, and succeeds there to its privileges.'

R. R. Co. *vs.* R. R. Co., 136 U. S. 356.

"The question involved here was with reference to the effect of consolidation of two corporations existing under the laws of different States, the consolidation having been made by the authority of the statutes of both States.

First paragraph of syllabus:

"'Railroad corporations, created by two or more States, so joined in their interests, in the operation of their roads, in the issue of their stock and in the division of their profits, so as practically to be a single corporation, do not lose their identity, but each has its existence and its standing in the courts of the country only by virtue of the Legislature of the State by which it was created, and the union of names, of officers, of business and of property does not change their distinctive character as separate corporations.'

"In the opinion in the case of C. & N. W. R. Co. *vs.* Aud. Gen'l, 53 Mich. 79, is cited with approval.

"See also the dissenting opinion of Landon, J., in People *vs.* N. Y. C. & St. L. R. Co., 61 Hun, dissenting opinion, pp. 77 to 82. See also reference to such opinion with approval in the same case, 129 N. Y. 474.

"The case was this: The respondent company was a railroad company composed by consolidation of pre-

existing corporations under laws of several different States, including the State of New York. The statute of New York provided that 'every corporation, joint stock company, or association incorporated by or under any general or special law of this State, having capital stock divided into shares, shall pay to the State Treasurer, for the use of the State, a tax of one-eighth of one per cent. on the amount of capital stock the joint stock company or association is authorized to have.'

"This suit was to recover a tax alleged to be due from respondent corporation under such statute.

"It appeared that the New York corporation which entered into such consolidation had paid a tax under this statute based upon the amount of its capital stock, which was greatly less than the capital stock of the consolidated company. The court below held the respondent liable, Judge Landon dissenting.

"Upon review by the Court of Appeals, the judgment below was reversed, Judge Andrews speaking for the court.

He discussed the question involved upon principle and authority, and concludes by referring with approval to the dissenting opinion of Judge Landon.

"Judge Landon, in the course of his opinion, uses the following language:

"'It is also clear, from the authorities, that when a consolidation is effected of corporations of different States, under the enabling statutes of the respective States, no new corporation as an entirety is formed, but each constituent remains in severalty, just as much the creature and creation of its parent State as it was before the consolidation.'

"It is clear, therefore, upon these authorities that the consolidation of the Michigan Southern Railroad Company with the several corporations organized under the laws of other States producing the entity known as the Lake Shore Michigan Southern Railway Company, did

not result in the surrender by the Michigan Southern Railway Company of its then existing charter, and the creation of a new corporation, nor did it result in the surrender by the Michigan Southern Company of its existing charter, and the creation of a new corporation under the general railroad law of the State, and the consolidation of that new corporation with the foreign corporation, but only in the fusion of the interests of the Michigan Southern Company with its existing charter with the other corporations entering into the consolidation.

"It must, I submit, be conceded that it was legally possible for the Legislature of Michigan, at the time of the passage in 1855 of the statutes under which the consolidations, the effect of which is here under consideration, were made, to permit such consolidations without disturbing the status of the Michigan Southern Railroad Company as a corporation existing under its special charter granted in 1846. No case has been or can be found adverse to this proposition. On the contrary, the cases cited show that even when the consolidation of companies existing under the laws of the same State—and hence where the consolidation would result in a new single entity for all purposes and everywhere—the question of whether or not, by such consolidation, the charters of the corporations so consolidating are surrendered and a new charter accepted, is ordinarily a question of legislative intention.

"Now, it is too clear for argument that the legislature by the passage of the act of 1855, authorizing the consolidation of the Michigan Southern Company with the Northern Indiana Company, did not intend that by acting under it, the said Michigan Southern Company should surrender its charter. It could not have so intended; because the result would have been the creation of a corporation by special act, which was forbidden by the constitution.

"The second consolidation was under color of the General Railroad Law, which contained the following provision, to wit:

" 'And all and singular, the rights and privileges of each and all of said two or more corporation, parties to such agreement' (the agreement of consolidation), 'and all and singular, their rights and interests in every species of property and things in action, shall be deemed to be transferred to and vested in such new corporation without any other deed or transfer, and such new corporation shall hold and enjoy the same * * in the same manner and to the same intent as if said two or more corporations, parties to said agreement, had continued to retain the title and transact the business of such corporations.'

"I submit that this provision discloses a clear intention on the part of the legislature that no right or franchise possessed by either of several companies consolidating should lapse or be lost, but that every such right or franchise should vest in the entity produced by such consolidation.

"Now, it is entirely clear that the right of the Michigan Southern Company to charge for the transportation of passengers not to exceed three cents per mile was a right or franchise within the meaning of this provision, and a right or franchise of which it could not be deprived except by amendment of its charter under the power reserved in that behalf by said charter. In fact, or rather in law, the right to damages on account of any alteration of its charter was itself a right and franchise within the meaning of such provision.

"The learned counsel lays stress upon the fact that the legislature characterizes the produced entity as a 'new corporation.' But I submit that this fact can have little, if any, bearing upon the question under consideration.

"In this connection, I call attention to the fact that the legislature in 1883, amended the 1846 charter of the Michigan Southern Company, thus recognizing it as still in existence and applicable to the Lake Shore & Michigan Southern Railway Co. (Session Laws 1883, p. 206.)

"Of course where two or more corporations, existing under the same statute, that is, under exactly similar charters, consolidate, the question of whether, by consoldating, their several charters are surrendered and a new charter accepted, is of no value even speculatively. My discussion has gone upon the assumption of the consolidation of domestic corporations existing under separate and differing charters.

"I insist and submit that a consolidation of two corporations existing under charters from two different States cannot result in a new single corporate entity. If it were so, a dissolution by *quo warranto* or otherwise of such corporation by proceedings in one of the said States, would put an end to its existence everywhere. But clearly this cannot be so. But further discussion of this subject seems unnecessary for the reason that the doctrine for which I am contending is settled by the authorities above cited."

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In addition to the foregoing argument and authorities cited by Mr. Pond, I submit the following:

In Tomlinson *vs.* Branch, 82 U. S. 460, it was held that when companies consolidate the presumption is that each of the two united lines of road will be respectively held with the privileges and burdens attaching thereto, unless the contrary is expressed. Bradley, J., said:

"If the old charters allowed ten cents, whilst the new allowed but five, the company would not hesitate, under the grant of the rights and privileges of the old, to continue to charge ten cents, as the former company had done, *and they would have reason on their side.*"

"The owners of the property were to lose no rights by the transfer, nor was the public to lose any rights thereby. Of course these remarks do not apply to those corporate rights and franchises of the old company which appertain to *its existence* and functions as a corporation. These become merged and extinct. *But all its rights* and duties, its privileges and obligations, *as related to the public* or to third persons, remain and devolve upon the new company."

He quotes from P. W. & B. R. Co. *vs.* Maryland, 10 How. 376, and says:

"It considered the evident meaning of the law to be that whatever privileges and advantages either of the former companies possessed should in like manner be held and possessed by the new company to the extent of the road which the said former companies had respectively occupied before the union; that it should stand in their place and *possess the powers, rights and privileges they had severally enjoyed* in the portions of the road which had previously belonged to them."

In County of Greene *vs.* Connors, 109 U. S. 104, it was held:

When two railroads are consolidated it is presumed that the franchises and privileges of each continue in respect to the several roads so consolidated.

In Tennessee *vs.* Whitworth (1885), 117 U. S. 139, L. Ed. B. 833–836, the same doctrine was approved.

In City Council of Charleston *vs.* Branch, 82 U. S. 470 (1872), it was held:

When two railroad companies are consolidated, each of the two united lines will be respectively held with the privileges and burdens originally attached thereto.

In Nash. & L. R. Co. *vs.* B. & L. R. Co., 136 U. S. 356 (34–363), the Court also said:

"There are many decisions, both of the Federal and State Courts, which establish the rule that however closely two corporations of different States may unite their interests, and though even the stockholders of one may become the stockholders of the other, and their

business be conducted by the same directors, *the separate identity of each as a corporation* of the State by which it was created and is a citizen of that State, is not thereby lost."

Citing and quoting from Farnum *vs.* Canal Corp., 1 Sum. 46; Muller *vs.* Dows, 94 U. S. 444 (24–207); St. L., A. & T. H. R. Co. *vs.* F. L. & T. Co., 49 Ill. 331; Quincy R. Br. Co. *vs.* Adams Co., 88 Ill. 619.

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In Shields *vs.* Ohio, 95 U. S. 320, the consolidation was of two roads situate wholly in Ohio and incorporated and consolidated solely under Ohio laws.

The Toledo, Norwalk & Cleveland R R. Co. and the Junction R. R. Co., both Ohio corporations, consolidated and formed the Cleveland & Toledo R. R. Co. in 1853. That Company, April 6, 1869, consolidated with the Lake Shore Ry. Co. and formed the Lake Shore Railway Company, and May 27, 1869, the Lake Shore Railway Co. consolidated with the Michigan Southern & Northern Indiana R. Co. and formed the Lake Shore & Michigan Southern Ry. Co.

The T., N. & C. R. Co. and the Junction R. Co., both being Ohio corporations, and the company formed by their consolidation being solely an Ohio corporation, it was held that under the Ohio statute the consolidated corporation was a corporation created by the general railroad law of Ohio and was subject thereto.

In People *vs.* N. Y., C. & St. L. R. Co., 61 Hun, 79, it is said:

"The cases there cited, Shields *vs.* Ohio, and Ry. Co. *vs.* Maine, were cases of the consolidation of domestic corporations."

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The Supreme Court of the United States, "when reviewing the final judgment of a State Court upholding a State enactment alleged to be in violation of the contract

In Keokuk & W. R. Co. *vs.* Missouri, 152 U. S. 301, it was held that the right to exemption from taxation of one of the constituent companies, did not pass to the consolidated company, because by the terms of the Act under which the consolidation was effected a new corporation was formed, "making one company of the two," and under the constitution of the State then (in 1869) in force "the legislature had no power to extend to a new corporation created by the consolidation an exemption contained in an act passed in 1857 before the constitution was adopted, and hence that, under the terms of this act, we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation."

The Court said: "*The new company may doubtless receive by transmission from its constituent companies their property, rights, privileges and franchises, including any immunity from taxation; but it receives them as an heir receives the estate of his ancestor, or as as a grantee receives the estate of his grantor, by inheritance, succession or purchase.*"

In the case at bar there was and is no constitutional prohibition which interfered with or limited the legislative power to permit the transfer to, and continue in, the consolidated company all the rights the Michigan Southern Company acquired and held under its charter and contract with the State, among which was the right to charge and receive fares not exceeding the limit prescribed.

clause of the Constitution, possesses paramount authority to determine for itself the existence or the non-existence of the contract set up, and whether its obligation has been impaired by the State enactment." Chicago, B. & Q. R. Co. *vs.* Nebraska, 170 U. S. 55, 68.

**It was within the power of the State to enter into contract with the company, securing to it the right to fix and charge for transportation of passengers rates not exceeding the rates specified, and to limit the exercise by the State of its power to fix and regulate rates by such contract.**

In Stone *vs.* Yazoo & Miss. R. R. Co., 62 Miss. 607, the charter of the company, passed in 1882, provided as follows:

"Section 6, * * * That said company shall have and possess the power of fixing, by its board of directors, the rates at which it will do express and telegraph business, and shall transport other express companies as may apply for transportation over its line, at a just and reasonable rate of compensation, and also the rates at which said company will transport persons or property over its railroads and branches; provided, said last mentioned rates shall not exceed four cents per mile for each passenger, nor exceed the following rates of freight * * * but in no case shall the railroad company be limited to a less charge than twenty-five cents for the transportation of any passenger, parcel, package or article, however short the distance. The rates so established from time to time by the said board of directors for transporting persons or property as a railroad company, not exceeding the maximum rates for railroad business as above set out, may be charged and collected by said company." * * *

The road was constructed, and in 1884 an act was passed creating a commission, and authorized it, among other things, to "increase or reduce any of said railroad rates, according as experience and business operations may show to be just."

The company claimed in its suit for an injunction that the act of 1894 was repugnant to the Tenth Section of Article One of the Constitution of the United States, which prohibits laws impairing the obligation of contracts, and to the Fourteenth Amendment.

The Court held that the statute was "unconstitutional and void in so far as it attempts to divert, impair or interfere with the chartered rights of the complainant," and said (p. 641):

"Section 6, of the charter of the appellee, confers on the company power to fix, from time to time, by its board of directors, the rates at which it will transport persons or property over its railroads, provided they shall not exceed a maximum specified in the act.

"The power to contract is an essential attribute of sovereignty, and is of prime importance. Its exercise has been productive of incalculble benefits to society, however great may be the evils incident to its injudicious employment. It cannot be denied merely because of its liability to abuse. *The power to contract implies the power to make a valid contract. Chartering railroad companies and other similar associations has long been an acknowledged and favorite exercise of legislative authority. The right to grant charters includes the right to grant such as will be upheld.* * * *

"A grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation which shall be just and reasonable.

"It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation that the power of the legislature afterward to interfere can be denied. It is not to be presumed that the right of legislative control was intended to be renounced Every presumption is against that. If the grant can be interpreted without ascribing to the legislature an intent to part with any power, it will be done. Only what is plainly parted with is gone. *Fixing rates in a charter is an exposition of what is reasonable—an exclusion of tacit or implied con-*

*ditions on the subject. It is an essential part of the contract of incorporation, the most important condition of its existence, the inducing cause of its acceptance.*

"That it was the legislative intent to vest in the appellee the unrestricted right to fix rates within the limits prescribed by the charter is clear; that this was a valid contract by the State and inviolable by it, we regard as settled authoritatively by Federal and State decisions too numerous for citation.

"*If anything is or ever can be settled in American constitutional law, the scanctity and inviolability of a contract between a State and individuals in the shape of a charter for a business enterprise, accepted and acted on by the corporators on the faith of its terms and provisions, must be so regarded.*

"*The appellee has the unquestionable right, from time to time, by its board of directors, to fix the rates at which it will transport over its railroads, provided those rates shall not exceed the maximum prescribed by the charter. That is the contract. These terms were expressly made. On the faith of them capital was invested and the enterprise set on foot. It is not allowable now for one of the contract parties to interfere with the exercise by the other of its plainly granted rights. They are secured beyond the reach of legislation and cannot be impaired.* The State cannot, by an act of its legislature, abdicate the right to govern artificial as well as natural persons, but it may create corporations, and where they are not a part of the machinery of government the franchise cannot be resumed by the legislature or its benefits be essentially impaired without the consent of the grantee. To hold otherwise would be revolutionary and disturb the foundations of society as molded by the judicial utterances of half a century of constitutional government in America."

In Georgia Railroad Co. *vs.* Smith, 128 U. S. 174, the company's charter provided:

"Section 12. The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise and produce, over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right; provided

that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles; and five cents per mile for every passenger."

The Court held that this section gave an exclusive right of transportation, provided the charges therefor did not exceed the rates specified, and that if it did not exceed those rates, its rights continued exclusive, but that if it charged more, its exclusive right would cease.

The Court, Mr. Justice Field, said:

"It is conceded that a railroad corporation is a private corporation, though its uses are public, *and that a contract embodied in terms in its provisions, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts.* If the charter in this way provides that the charges which the company may make for its services in the transportation of persons and property shall be subject only to its own control up to the limit designated, *exemption from legislative interference within that limit will be maintained.*"

In Reagan case, 154 U. S. 362, the Court, by Brewer, J., said:

"*If the charter had in terms granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons or property, it would not be doubted that the express stipulation formed a part of the obligation of the State which it could not repudiate.*"

In the Munn case, 94 U. S. 113, and the Granger cases, 94 U. S. 155, 164, 179, 180, there was no claim that the State had by charter entered into contract fixing rates. The cases therefore do not present the question here involved. Mr. Chief Justice Waite, however, in his opinion in the case C. B. & Q. R. Co. *vs.* Iowa, 94 U. S. page 155, says:

"This company, in the transaction of its business, has the same rights and is subject to the same control as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a

reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons when controversies arise, what is reasonable. *But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit and make it a part of the charter, and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done the charter might have presented a contract against future legislative interference.* But it was not; and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of the legislators for protection against wrong under the form of legislative regulation."

And in Peik *vs.* Chicago, etc., Ry. Co., 94 U. S. 164, Chief Justice Waite said:

"In Munn *vs.* Illinois, *supra*, p. 113, and Chicago, Burlington & Quincy Rd. Co. *vs.* Iowa, *supra*, p. 155, we decided that the State may limit the amount of charges by railroad companies for fares and freights, *unless restrained by some contract in the charter*, even though their income may have been pledged as security for the payment of obligations incurred upon the faith of the charter. So far the case is disposed of by those decisions."

The case of Ruggles *vs.* Illinois, 108 U. S. 526, is clearly distinguishable from the case at bar.

In that case the charter provisions relied upon as constituting a contract were as follows:

"Section 5. All the corporate powers of said company shall be vested in and exercised by a board of directors, and such officers and agents as they shall appoint. * * *

"Section 6. The said company shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well-ordering, regulating and securing the affairs, business and interest of the company:

*Provided*, That the same be not repugnant to the Constitution and Laws of the United States or of this State, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same, as they shall from time to time by their by-laws determine, and to levy and collect the same for the use of the said company. The transportation of persons and property, the width of track, and all other matters and things respecting the use of said road, shall be in conformity to such rules and regulations as the said board of directors shall from time to time determine."

There is a material difference between the charter provisions in that case and in the case at bar.

*In that case no maximum rate was fixed as in the case at bar.* Consequently it may well be held that the matter was left subject to legislative control, while in this case a maximum is fixed.

In that case rates could only be fixed *by by-laws* which it was provided should not be repugnant to the laws of the State, and it was held that by-laws which fixed rates above those allowed by the laws of the State were repugnant to such laws.

It is true that sections 11 and 28 of Michigan Southern Company's charter contain provisions in relation to by-laws, but section 15 provides that the company may "from time to time fix, regulate and *receive* the tolls and charges taken for the transportation of property and persons on said railroad" * * * *provided said company shall charge no greater sum than was charged or authorized by the State, Jan.* 1, 1846. There were many matters to be embraced in the by-laws, and the company was permitted to fix rates by by-laws under section 11, but as it evidently was the intention to grant to the company the power to fix rates not exceeding those of January 1, 1846, it was expressly and without limitation or qualification conferred upon the company independently of by-laws. In the Ruggles case stress is laid upon the fact that there was "nothing which even in the remotest degree indicates that a by-law fixing rates is to be of a different character

from those regulating the other business of the company," and therefore it was held that rates fixed by by-laws must conform to the law of the State.

Here, in the case at bar, by section 15, the power is given the company absolutely and unqualifiedly to fix rates not exceeding the maximum named, showing that it was intended that the rate-making power should not be subject to the limitations imposed upon the power to make by-laws.

Here, by section 15, the right and power to fix rates for transportation of passengers is granted subject only to the limitation specified which fixes the maximum.

The power was not, as in Ruggles case, only limited by the laws of the State generally, but by a limit clearly defined and stated, so that the question whether the State could confer the power without limit is not in the case.

In case the grant of power to fix rates is unlimited, as appears by the cases above referred to, the legislature may fix the maximum, but where the maximum is fixed by the charter and contract, its power in that behalf is at an end.

In the Ruggles case the Court said:

"Since, *in the absence of some reasonable contract*, the State may establish a maximum of rates to be charged by railroad companies for the transportation of passengers and property, it follows that when the maximum is so established the rates fixed by the directors must conform to its requirements. Otherwise the by-laws will be repugnant to the general law."

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**The contention that the act in question is valid because it is within the scope of the police power of the State cannot be sustained.**

The police power cannot be successfully invoked to sustain a violation of the requirements and safeguards of the constitution, but it is subordinate thereto.

The public health, the public morals and the public safety are the subjects embraced within the strict and constitutional meaning of the term "police power."

Judge Cooley, in his work on Constitutional Limitations, page 718 (4th ed.), says, in speaking of certain contracts being subject to exercise of the police power:

"Perhaps the most striking illustrations of the principle here stated will be found among the judicial decisions which have held that the rights insured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the State with a view to the public protection, health and safety, and in order to guard properly the rights of other individuals and corporations. Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter-contract, removed from the sphere of State regulation, and that the charter implies an undertaking, on the part of the State, that in the same way in which their exercise is permissible at first, and under the regulations then existing, and those only, may the corporators continue to exercise their rights while the artificial existence continues. The obligation of the contract by no means extends so far; but, on the contrary, the rights and privileges of the citizen, are subject in like manner to proper rules for their due regulation, protection and enjoyment.

"*The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise.*"

The doctrine of Holden *vs.* Hardy, 169 U. S. 366, does not conflict with but rather sustains my contention. There the Court held that the protection of the health and morals, as well as the lives of citizens, is within the police power of the legislature, but that while the police power "cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances."

In Allgeyer *vs.* Louisiana, 165 U. S. 578–591, it is said:

"In the exercise of such right (the police power) care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution."

In Chicago, B. & Q. R. Co. *vs.* Nebraska, 170 U. S. 55, 72, it is said:

"Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes by legislative acts, and *where the subject-matter of the contract is one which affects the safety and welfare of the public*, other principles apply. *Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health and morals*, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when such

contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature."

Certainly the act in question here does not concern or affect the "safety, health or morals" of the public.

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In Pingree *vs.* Michigan Central Railroad Company, 76 N. W. Rep., 635, decided October 3, 1898, a charter similar to that in question here, and passed by the legislature of Michigan in the same year, was under consideration and the Supreme Court of Michigan held that:

"The right to regulate tolls on a railroad may be granted to the company by the legislature so as to render an attempt by a succeeding legislature to fix the tolls an impairment of a contract within the Federal Constitution.

"Laws 1846, Act No. 42, authorized the sale of the Central Railroad, owned by the State, and the incorporation of the Michigan Central Railroad Company in its place. Section 12 provided that the company should have power to regulate the time and manner in which goods and passengers should be transported on said railroad as well as the manner of collecting the tolls. Section 15 provided that the company might fix, regulate and receive the tolls taken for the transportation of property and persons on the railroad, 'subject only' to a limitation as to passengers of 3 cents a mile, and 10 cents in addition on distances not exceeding 30 miles. On the other hand, section 11 provided that the company should have power to charge for tolls and transportation such sums as shall be 'lawfully' established by the by-laws of the company, and section 30 conferred on the board of directors the power to pass all by-laws necessary for the carrying into execution of the powers vested in the company, provided such by-laws should not be contrary to the constitution or laws of the United States, or 'of the State.' *Held*, that the act confers a contract right on the corporation to fix tolls within the limit of three cents per mile,

which right cannot be violated by acts of a succeeding legislature, and that sections 11 and 30 do not qualify the previous sections quoted in so far as they confer such right.

"Pub. Acts 1891, No. 90, reducing the rate per mile on the Michigan Central Railroad to two cents where a 1,000-mile ticket is bought, which does not purport to amend the charter of the railroad, or to make a provision for compensating the railroad for the loss, is not an exercise of the power of amendment reserved in Laws 1846, Act No. 42, § 39, incorporating the road, and reserving the right by a two-thirds vote of the legislature to 'alter, amend, and repeal the charter, provided that the company shall be compensated by the State for all damages" sustained thereby."

The opinion fully sustains all of the propositions here urged by me under the Second Point, except the one relating to the effect of consolidation.

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The judgment of the Supreme Court of Michigan should be reversed.

GEO. C. GREENE,
Of Counsel for Plaintiff in Error.

BUFFALO, January, 1899.

# APPENDIX.

## I.

### *CHARTER OF THE MICHIGAN SOUTHERN RAILROAD COMPANY.*

Passed May 9, 1846.

"An act to authorize the sale of the Southern Railroad and to incorporate the Michigan Southern Railroad Company:

(Act No. 113, Session Laws of 1846.)

"Section 1. Be it enacted by the Senate and House of Representatives of the State of Michigan, That James J. Godfroy, Samuel J. Holley, Harry V. Man, Charles Noble, George W. Strong, Austin E. Wing, Henry Waldron, Stillman Blanchard, Frederick W. Macy, John Burch, Dan B. Miller, Benjamin F. Fifield, William C. Sterling, Wedworth Wadsworth, Edward Bronson, Daniel S. Bacon, Thomas G. Cole, and such other persons as shall associate with them for that purpose, are hereby made and constituted a body corporate and politic, by the name and style of 'The Michigan Southern Railroad Company,' with perpetual succession, and by that name shall be capable in law of taking, purchasing, holding, leasing, selling, and conveying estates and property, whether real, personal, or mixed,

so far as the same may be necessary for the purpose hereinafter mentioned, and no further; and in their corporate name they may sue and be sued; may have a common seal, which they may alter and renew at pleasure, and may have and exercise all powers, rights, privilegs, and immunities which are or may be necessary to carry into effect the purposes and objects of this act, as the same are hereinafter set forth: *Provided*, that nothing in this act contained shall extend or be constructed to authorize the said company to carry on the business of banking, brokerage, or any other business except what properly belongs to a railroad and transportation company, as hereinafter provided.

"Section 2. The said company, within thirty days after the time this act shall take effect and be in force, shall have the right to contract with and purchase from the State, and the State will sell and grant to the said company, all the right, title and interest of the State in and to the Southern Railroad, and all its appurtenances, including the Tecumseh branch, and all rights of way for a railroad between Tecusmeh and Manchester, which the State now has, or is entitled to, and all machine shops and other buildings, and stock and materials upon said road, of whatever name or kind, and all lands or rights of way which the State has or may have acquired in connection with said railroad, for the price or sum of five hundred thousand dollars; of which the sum of ten thousand dollars shall be paid by the said company at the State treasury, to the State Treasurer, within thirty days after the time this act shall take

effect and be in force, and the further sum of forty thousand dollars within three months from the time this act shall take effect and be in force, to be paid as hereinafter provided; and at the time of making said payment of forty thousand dollars, the said company shall execute to the State of Michigan a bond, in the penal sum of one hundred thousand dollars, with sufficient sureties, or securities, to be approved by the Auditor General, conditioned for the payment to the State of all damages it may sustain from the said company's neglecting to return to the State the stock, materials and furniture of said road, of whatever name or kind, in as good condition and of equal value, as when the same was received by said company from the State, in case of any forfeiture of said railroad to the State for any of the causes in the next succeeding section specified; and thereupon the said company shall immediately thereafter be put into and be entitled to the possession of said railroad and its appurtenances, including all lands, machine shops and other buildings (saving and except that any person who may own any building upon the land belonging to the State on the line of the Southern Railroad, which land may be transferred to said company under this act, may dispose of or take away such building within three months after such transfer), and their furniture, and all stocks and materials upon said railroad of whatever name or kind; and said company shall, within six months from the time when this act shall take effect and be in force, purchase and place upon the said road additional locomotives and cars of the value of twenty

thousand dollars. And if said company shall, within nine years from the payment of said sum of forty thousand dollars, pay to the State the further sum of four hundred and fifty thousand dollars in eighteen equal semi-annual installments of twenty-five thousand dollars each, together with the interest upon all portions of the purchase money remaining unpaid, at the rate of six per cent. per annum, to be paid semi-annually, to be computed from the time when the said sum of forty thousand dollars shall have been paid by said company to the State, said sum of four hundred and fifty thousand dollars, and interest thereon, to be paid at the State treasury in the manner prescribed for the payment of the aforesaid sum of forty thousand dollars, then and immediately thereafter, all the right, title and interest of the State to the Southern Railroad and all its appurtenances, including all machine shops, depots and other buildings, and stock upon the said road, of whatever name or kind, and all lands and estates, or interest in land, and rights of way which the State has or may have acquired in connection with said railroad, and for the purposes thereof, and which it may lawfully convey (save as aforesaid), shall then and thereafter vest in and become the property of said company; but such interest in lands shall not extend to or include any lands granted to the State by the government of the United States, for the purposes of internal improvement: *Provided*, that nothing in this section contained shall be construed as rendering the State liable by reason of any want of power to convey or for

any defect or failure of the title in and to the property granted, or any part thereof.

"Section 3. In case said company shall not within thirty days after the time this act shall take effect and be in force pay into the State treasury the sum of ten thousand dollars, and within three months from the time this act shall take effect and be in force, the further sum of forty thousand dollars, in manner provided in the last preceding section, then in such case, said Michigan Southern Railroad Company hereby incorporated, shall immediately be and become dissolved, and shall thenceforward neither have nor exercise any of the rights, privileges, or immunities of a body corporate or politic for any purpose whatsoever; and in case the said company shall pay into the State treasury in manner aforesaid, the sum of ten thousand dollars within thirty days after the time this act shall take effect and be in force, and within three months after the time this act shall take effect and be in force, the further sum of forty thousand dollars, but shall fail to pay into the State treasury in the manner and within the times above specified, after such payment of the said sum of forty thousand dollars, the further sum of four hundred and fifty thousand dollars, with interest on the same semi-annually, at the rate of six per cent. per annum, to be computed as aforesaid, or shall fail to pay any part thereof when due and payable, then in such case the said sum of ten thousand dollars, and the said sum of forty thousand dollars, and all other sums that may have been paid prior to such default, shall be and become absolutely

forfeited to the State; and all property and estate of whatever name or kind, which said company shall be seized or possessed of or entitled to, shall immediately become forfeited to and vest in the State to all intents and purposes; and the State may immediately thereafter take possession of the same, and all corporate franchises hereby granted shall then and thereafter become and be wholly null and revoked;

* * * * *

"Section 5. The said Michigan Southern Railroad Company shall have full power and authority to locate, and from time to time to alter, change, and relocate, so as not to materially change the route, construct and reconstruct, and fully to finish, perfect and maintain a railroad, with one or more tracks, from some suitable point at or near the mouth of the ship canal, in the city of Monroe, to pass through the villages or towns of Petersburg, Adrian, Hillsdale, and thence to Coldwater, by the way of Jonesville, if deemed the most practicable route, and from thence to Lake Michigan, on the line heretofore established as the line of the Southern Railroad by the State, or anywhere further southward than said line, and also from the junction of the Tecumseh branch with the said Southern Railroad, to pass through the villages of Tecumseh and Clinton, to the village of Manchester, in the county of Washtenaw, in this State, and to transport, take and carry property and persons upon said railroad or way, by power and force of steam, or of animals, or of any mechanical or other powers, or any combination of them which said company may choose to use or apply.* * *

"And no railroad or railroads, from the eastern or southern boundary of the State shall hereafter be authorized to be built or constructed by or under any law of this State, any portion of which shall approach westwardly of the township of Monroe, in the county of Monroe, within five miles of the line of said railroad, as designated in this act; nor shall any railroad or railroads be so authorized to be built or constructed which shall commence within twenty miles of the city of Monroe, and extend to Lake Michigan, or the southern boundary line of the State, and the line of which shall, on an average, run within twenty miles of the main line of the said Michigan Southern Railroad: *Provided*, that this section shall not be construed to restrict or prevent the construction of public roads or canals, or private ways, under, above or across the road of said company, when deemed expedient, but so as not necessarily to obstruct the same.

* * * * *

"Section 11. The said company shall have power to purchase with the funds of the company, or contract for and place on any railroad constructed by them under this act, all machines, wagons, carriages, or vehicles of any description which they may deem necessary and proper for the purposes of transportation on said railroad, and they shall have power to charge for tolls and transportation such sums as shall be lwfully established by the by-laws of said company, not exceeding the rates charged upon said Southern Railroad on the first day of January last; and it shall not be lawful for any

other company, or any other person or persons, to transport any passengers or merchandise, or property of any description whatever, upon said railroad or any part of it, without the license or permission of said company; and the said railroad, with all its improvements, works and profits, and all machinery used on said railroad, for transportation, and all the machine shops, depots, buildings and edifices connected with said railroad shall be vested in the said company forever; and the shares of the capital stock of said company shall be considered personal property, and shall be transferable on the books of said company, agreeably to the by-laws of said company, and subject to be taken in execution agreeably to such laws as are or may hereafter be in force.

"Section 12. The said company shall have full power and authority to demand and recover and take the tolls or dues to and for their own proper use and benefit on all goods, merchandise and passengers using or occupying the said railroad, or any other convenience, erection or improvement built, occupied or owned by the said company, to be used therewith, and shall have power to regulate the time and manner in which goods and passengers shall be transported, taken and carried on the same, as well as the manner of collecting all tolls and dues on account of transportation and carriage, and storage, and shall have full power to erect and maintain such toll-houses and other buildings for the accommodation and proper transaction of their business as to them may seem necessary: *Provided*, that at the eastern termination of said railroad no greater or

higher charges shall be allowed or charged for the storage or shipment of property than shall be charged or allowed for like service by the Michigan Central Railroad Company at the eastern termination of the Michigan Central Railroad.

* * * * *

"Section 15. It shall and may be lawful for the said company from time to time to fix, regulate and receive the tolls and charges taken for the transportation of property and persons on said railroad as aforesaid, hereby authorized to be constructed, erected, built, made and used, and for storage of property remaining in the depot of said campany, if not taken away as hereinafter provided: *Provided*, said company shall charge no greater sum or tolls for the transportation of persons or property than were charged or authorized by the State of Michigan to be taken on the Southern Railroad, on the first day of January last; and said company shall transport merchandise and property on the said road without showing partiality or favor, and with all practicable dispatch, under a penalty for each violation hereof of one hundred dollars, to be recovered by the party aggrieved in an action of debt: *Provided*, *nevertheless*, that soldiers, sailors and marines, and their officers, in the service of this State or of the United States, and officers of the army and navy of the United States, and arms, ordinance, military stores and munitions of war, shall, upon request made by the proper authority, take priority and precedence, first in favor of this State, and secondly in favor of the United States, and shall be transported

upon said railroad before and in exclusion of all other persons and property.

* * * * *

"Section 31. The said company shall pay to the State an annual tax of one-half of one per cent. upon the capital stock paid in, including the five hundred thousand dollars of purchase money paid, or to be paid to the State, until the first day of February, eighteen hundred and fifty-one, and thereafter an annual tax of three-fourths of one per cent. upon its capital stock paid in, including the five hundred thousand dollars of purchase money aforesaid, and also upon all loans made to said company, for the purpose of constructing said railroad, or purchasing, constructing, chartering or hiring of steamboats authorized by this act to be held by said company, which tax shall be paid in the last week of January in each year to the State Treasurer, and the property and effects of said company, whether real, personal or mixed, shall, in consideration thereof, be exempt from all and every other tax, charge and exaction by virtue of any laws of this State, now or hereafter to be in force, except penalties by this act imposed.

* * * * *

"Section 34. The State may, at any time after the first day of January, eighteen hundred and sixty-seven, purchase and take from said company, said railroad, and all the property, effects and assets of said company, and said railroad and appurtenances thereof; and all the estate, property, effects and assets of said company (subject to all existing mortgages and other liens thereon, on account of loans, he

proceeds of which shall have been invested in the said road or other works of said company), shall fully and forever vest and become the estate, property and effects of the State, to all intents and purposes, so soon and whenever after the day aforesaid, the State shall pay or cause to be paid to said company the value of the entire stock of, and shares in said company, at the market value of said stock or shares, and ten per cent. in addition to such market value of said stock or shares; such market value to be ascertained by taking the average of the public sale prices of said stock or shares, as made in the city of Boston, in Massachusetts, and in the City of New York, in the State of New York, during the twelve months next preceding the first day of January, in the year in which the State shall so purchase; but in no case shall the amount to be paid be less than the amount of capital actually paid in by the stockholders of said company; and in case the State and said company cannot agree upon the said market value of said stock or shares, the Supreme Court of this State shall be competent to determine the same, upon application thereof, to be made to said Court within six months after the State shall elect to purchase; and the moneys so to be paid to said company shall be payable at the State treasury of the State of Michigan, in lawful current money of the United States, within two years after the time when the State shall elect to purchase, and the amount to be paid shall have been determined, as herein provided, upon three months' previous notice of the time of such payment, to be published weekly in one or more newspapers

published in the city of Detroit, or at the capitol of the State of Michigan, and thereupon the corporate powers and franchises of said company shall wholly cease, and the rights and franchises vested, or which may vest in said company under or by virtue of this act, shall not in any manner be prejudiced or affected save as herein provided, or by judicial proceedings, or by a repurchase of said railroad; to be made by the State in manner aforesaid: *Provided*, that whenever in this act provision is made for a penalty to accrue, for the doing or not doing any act, said company shall in no wise be prejudiced by the doing or not doing of such act, except by the enforcement of such penalty.

"Section 35. All lands and property, and rights and interests therein, acquired by said company, by purchase or otherwise, in case of the repurchase of the railroad of said company by the State, shall become vested in the State in as full and ample a manner as the same were vested in, or exercised or enjoyed by the said company; and all deeds and conveyances, gifts and grants of real and personal property to said company, and all inquisitions taken or had under this act, to which said company shall be a party, shall, in case of repurchase, accrue to the State in the same and as full and ample a manner as if the State had been the party to such deeds, conveyances, gifts, grants and inquisitions, instead of said company; and the State shall have full right and authority to have and use the same, and sell, assign and transfer the same to any person or persons whatever. * * * *

"Section 37. The State reserves the right at any time after thirty years from the passage of this act, by a vote of two-thirds of each branch of the legislature, to alter, amend or repeal the same; *Provided*, the said company shall be compensated by the State for all damages sustained by reason of such alteration, amendment or repeal."

## II.

## *AN ACT TO AUTHORIZE THE MICHIGAN SOUTHERN RAILROAD COMPANY TO CONSOLIDATE WITH THE NORTHERN INDIANA RAILROAD COMPANY.*

(Act No. 138, Session Laws of 1855)

"Section 1. *The People of the State of Michigan enact*, That the Michigan Southern Railroad is hereby authorized to consolidate with the Northern Indiana Railroad Company, of Indiana, by a vote of a majority in interest of the stockholders of each of said corporations, at meetings called for that purpose, or by the written assent of such majority, to be filed in the office of the Secretary of State; and when said vote shall be passed, and such assent filed, and an agreement entered into, as provided in section two, said corporations shall thereby be united and become one corporation, to be called the Michigan Southern and Northern Indiana Railroad Company; and all the franchises, properties, powers and privileges, now enjoyed by the Michigan Southern Railroad Company, and all the restrictions, liabilities and obligations imposed upon said two corporations, by virtue of their respective charters, and all contracts by and with either or both of said corporations, shall appertain to said united corporation, in the same manner as if the same had been contained

in or acquired under an original charter, or made by or with said consolidated corporation, and in the same manner as if such consolidation had not taken place; and all debts and demands against said Michigan Southern Railroad Company, shall be enforced against said new corporation, to the same extent and in the same manner as if such debts or demands had been originally incurred by it; and all obligations of said Michigan Southern Railroad Company, under the act entitled 'An act to authorize the sale of the Southern Railroad, and to incorporate the Michigan Southern Railroad Company,' and of the directors thereof, shall be transferred to said new corporation, and the directors thereof, and said new company shall cause its books to be opened, for the purpose of receiving subscriptions to its capital stock for the purpose of extending said road, in the same manner and upon the same terms as the Southern Michigan Railroad Company would have been required to do if such consolidation had not been made; and any person or persons may subscribe stock for the extension of either of the roads named in said section, in the same manner and upon the same terms as if no consolidation had taken place; and the directors of said new company shall cause the said road to be constructed in the same manner and upon the same conditions as said Michigan Southern Railroad Company would have been compelled to do, were it not for such consolidation; and the shares on the road so extended shall be entitled to a dividend of the net profits of said road, in proportion to the amount of installments paid in on the respective

shares of said company; and the persons so subscribing and paying shall be stockholders in said new company, and entitled to all rights and privileges of the original stockholders of said new company, in the same manner and to the same extent as is contemplated by the original charter of the said Michigan Southern Railroad Company.

"Section 2. The directors of said corporations may enter into an agreement, under their respective corporate seals, for the consolidation of said corporations, prescribing the terms and conditions thereof; the mode of carrying the same into effect; the number of directors thereof, which shall not be less than seven nor more than thirteen; the names of the first directors of said united corporation; the time and place of holding the first election of directors; the day for holding the annual election of directors; the amount of capital and the number of shares of the stock of the new corporation, which shall not be larger in amount than the aggregate amount of capital authorized by the charters of the respective companies thus consolidated; the manner of converting the shares of capital stock in each of said corporations into the shares of such new corporation, with such other details as they may deem necessary to embrace in such agreement, not inconsistent with the provisions of their respective charters.

"Section 3. The said corporation so to be organized, by virtue of this act, shall continue subject to the same rate of tax as though such consolidation should not take place; and the amountt of its capital and loans hereafter, upon which such taxation shall

be paid, shall be such portion of the whole of its capital and loans as is actually employed in the State of Michigan, to be ascertained on or before the first day of January in each year, by the Auditor General of this State, from the annual report of said corporation, or from such other reports on oath as he may deem necessary for such purpose, to be ordered by him from the office of such corporation.

"Section 4. The said new company shall erect and maintain fences on the sides of their road, of the height and strength of a division fence, required by law, with suitable openings and gates thereon, and convenient farm crossings of the road for the use of proprietor of land adjoining said railroad, and also to construct and maintain cattle guards at all public road crossings, except in cities and villages, suitable and sufficient to prevent cattle and animals from getting on to the railroad; until such fences and cattle guards shall be duly made, such railroad company and its agents shall be liable for all damages which shall be done by their agents or engines to cattle, horses or other animals thereon, and for all other damages consequent upon their refusal or neglect to maintain fences as aforesaid; and after such fences and guards shall be duly made and maintained, said company shall not be liable for any such damages, unless negligently or willfully done; and if any person shall ride, lead or drive any horse or animals on such road, and within such fences or guards, other than road crossings, without the consent of such company, he shall, for every such offense, forfeit a sum not exceedng ten dollars, and shall pay all

damages which shall be sustained thereby to the party aggrieved.

"Section 5. The said new corporation, so to be formed by such consolidation, shall at all times carry freight and persons to and from all its depots, way-stations, and other places where it is accustomed to receive or deliver such freight or persons, with all practicable dispatch, without any favoritism or partiality whatsoever, (and as near as may be) shall forward from each of such depots, way-stations or places, in the order it is received thereat respectively, when desired by the owner thereof, all freight delivered to it for transportation; and in case of any neglect in either of the particulars before mentioned, said company shall be liable for all damages occasioned thereby to the owner of the property so delivered for transportation, in any form of action such owner may select; and said company shall in no case give any precedence or preference whatsoever in the time of transportation to through freight over way freight; and in case any such preference or precedence is given, said company shall be liable to a like action and damage therefor; and it shall also be liable to a like action and damages for all delays in the transportation of property, unless such delay shall be caused without any default, neglect or wrongful act whatsoever, on the part of such corporation or its agents or employes; and when an action for damages is given in this section, the party injured may sue for, and said company shall be liable for a penalty of one hundred dollars, instead of such action, at the election of the party owning any such property.

"Section 6. This act shall take effect whenever the said companies shall accept the same; and their acceptance in writing, signed by the president and secretary of said companies, under their corporate seals, shall be filed in the office of the Secretary of State.

"Approved February 13, 1855."

## III.

## *GENERAL RAILROAD LAW OF MICHIGAN AS IT STOOD IN 1869 WHEN THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY CONSOLIDATION WAS EFFECTED.*

From Chapter LXXV, Compiled Laws Michigan, 1871, Vol. 1, Page 744.

"*An Act to provide for the incoporation of railroad companies:*

(Approved February 12, 1855, Laws 1855, p. 153.)

"Section 1. *The People of the State of Michigan enact*,, That any number of persons, not less than twenty-five, being subscribers to the stock of any contemplated railroad, railroad bridge, or railroad tunnel, may be formed into a corporation for the purpose of constructing, operating, and maintaining such railroad, railroad bridge, or railroad tunnel, over or under any of the waters of this State, by complying with the following requirements: When stock to the amount of one thousand dollars for every mile of said road so intended to be built, or to the extent of one-half of the estimated cost of any such bridge or tunnel so intended to be built, shall be in good faith subscribed, and five per cent. paid thereon, as herein

required, then such subscribers may select directors for said company; and thereupon, they shall severally subscribe articles of association, in which shall be set forth the name of the corporation; the number of years the same is to be continued, the amount of the capital stock of the company, which shall not be less than eight thousand dollars per mile of road constructed or proposed to be constructed of the 'T' or continuous rail, and not less than four thousand dollars per mile of road constructed or proposed to be constructed with the flat-bar rail, and not less than half the estimated cost of any such bridge or tunnel: *Provided*, That no car shall be run at a higher rate of speed than fifteen miles per hour upon any road so constructed with the flat-bar rail; the number of shares of which the stock shall consist; the number of directors and their names, who shall not exceed in number one-half the stockholders; the place from and to which the proposed road is to be constructed, and each county into or through which it is intended to pass, and its length, as near as may be, and the name of five commissioners to open books of subscription to the stock; and in the case of such bridge or tunnel, the locality in which it is intended to construct the same. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock taken by him in such company. The articles of association may be filed in the office of the Secretary of State: *Provided*, That such articles of association shall not be filed in the office of the Secretary of State, as aforesaid, until five per cent. of the amount of stock

subscribed thereto shall have been actually paid in cash to the directors named in such articles, nor until there is annexed thereto an affidavit made by at least one-half of the directors named in said articles, that the amount of stock required by this section, to-wit: One thousand dollars per mile for any such railroad, or one-half of the estimated cost of any such railroad bridge or tunnel, has been subscribed, and that five per cent. of the amount has been actually paid in; and thereupon, the persons who have subscribed, and all persons who shall from time to time become stockholders in such company, shall be a body corporate, by the name specified in such articles, and shall be capable of sueing and being sued, and may have a common seal, and may make and alter the same at pleasure, and be capable in law of purchasing, holding and conveying any real and personal property whatever, necessary for the construction of such road, bridge, or tunnel, and for the erection of all necessary buildings, yards, and appurtenances for the use of the same, and shall have power, annually thereafter, or at such other times as the stockholders owning not less than one-fourth of the stock shall determine, and in the same manner as provided in section nineteen hundred and fifty of the Compiled Laws, to call a meeting of the stockholders, and thereat to choose not less than seven nor more than thirteen directors, who shall be members of said body corporate; and all the provisions of section four of this act shall apply to the election of such directors; and any railroad bridge or railroad tunnel company shall, for all the purposes of this act, be deemed and taken

to be a railroad company, and shall be entitled to all the benefits of all the provisions of this act, and subject to all its restrictions: *And provided further*, That any railroad bridge company or railroad tunnel company, which may be organized under this act to bridge or tunnel the Detroit river or the St. Clair, or any of the waters in the jurisdiction of this State, shall have the right to consolidate the stock, property, and assets of said company, with the stock, property, and assets of any company organized or to be organized under the laws of this State, or which may be created under the laws of any adjacent State or country, to construct any such bridge or tunnel to connect therewith, upon such terms, conditions, and agreements as may by the said two companies be deemed just and equitable: *Provided*, That every such bridge or tunnel shall be so constructed as not to be a material obstruction to navigation.

* * * * *

"Section 17. Every such corporation shall possess the general powers, and be subject to the liabilities and restrictions following, that is to say,— * * * * *

Ninth. To regulate the time and manner in which passengers and property shall be transported and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger, and his or her ordinary baggage, shall not exceed the following prices, viz.: On roads over twenty-five miles in length, three cents per mile; on roads not over twenty-five miles in length, four cents per mile; on roads not over twenty-five miles

in length, for any distance under six miles, twenty-five cents, unless by special act of the Legislature, and shall be subject to alteration as hereinafter provided: *Provided*, That the rate of freight charged and collected by the officers and agents of such railroad for any shorter distance, shall never exceed that charged and collected for the same class of goods over a longer distance upon the said road; nor shall the rates of freight charged and collected by the officers or agents of said road between any intermediate stations upon said road, at any time exceed by more than twenty-five per cent. the pro rata charge per mile for the same character of freight over longer distances upon the said road, or for the entire distance and length of said railroad.

* * * * *

"Section 45. Every corporation formed under the provisions of this act shall, on or before the first day of July, in the year one thousand eight hundred and sixty-nine, and annually thereafter on or before the first day of October of each year, pay to the State Treasurer, on the statement of the Auditor General, an annual tax of one per cent. on the capital stock of said company paid in, and also upon all sums of money, whether arising from the net proceeds of said road, from municipal aid, from the sale of lands, or from other sources, as shall from time to time be invested in the original construction and stocking, or in any new construction or stocking of said road, which tax shall be in lieu of all other taxes upon the property of said company, whether real, personal, or mixed, except penalties by law imposed; and such

tax shall be estimated upon the last annual report of said corporation filed in the office of the Auditor General, as required by section thirty-two of this act; but nothing contained in this section shall apply to any corporation existing at the time of the approval of the act of which this is amendatory, nor to alter, reduce, or in any way affect the tax of any corpration not formed under the provisions of said act: *Provided*, That no corporation formed under the provisions of the act to which this is amendatory shall be liable to pay any tax on any money expended on any portion of its road, which has not been opened for use.

* * * * *

"Section 50. Any railroad company in this State, forming a continuous or connected line with any other railroad company, may consolidate with such other company, either in or out of this State, into a single corporation: *Provided*, That no such companies owning parallel or competing lines shall be permitted to consolidate themselves into one corporation. The directors of said two or more corporations may enter into an agreement, under the corporate seal of each, for the consolidation of the said two or more corporations, prescribing the terms and conditions thereof; the mode of carrying the same into effect; the name of the new corporation; the number of the directors thereof, and the names of those who shall be the first directors, which shall be deemed and taken to be the first election of the directors of the consolidated company, which number shall not be less than seven nor more than thirteen; the time and

place of holding the first election of directors after such consolidation, which time shall not exceed six months after such consolidation has been sanctioned by the stockholders of said two or more corporations as hereinafter provided; the number of shares of capital stock in the new corporation; the amount of each share; the manner of converting the shares of capital stock in each of said two or more corporations into shares in such new corporation, with such other details as they shall deem necessary to perfect such consolidation of said corporations. And such new corporation shall possess all the powers, rights, and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions, and perform all the duties imposed by the provisions of their respective charters or laws of organization, not inconsistant with the provisions of this act. Such agreement of the directors shall not be deemed to be the agreement of the said two or more corporations until after it has been submitted to the stockholders of each of said corporations, separately at a meeting thereof, to be called upon a notice by publication at least once in each week for four successive weeks, in one of the daily papers published in the City of Detroit, and some newspaper published in each county in this State through which said roads run, in which newspaper shall be published the first publication to be at least sixty days before the time specified for said meeting, and signed by the secretaries of each of the said companies proposing to consolidate, stating the purpose and object of said meeting, and has been sanctioned by such stockhold-

ers by a vote of a majority in interest of the stockholders, in person or by proxy, each share of capital stock being entitled to one vote; and when such agreement of the directors has been so sanctioned by each of the meetings of the stockholders, separately, after being submitted to such meetings in the manner above mentioned, then such agreement of the directors shall be deemed to be the agreement of the said two or more corporations. A copy of said contract or consolidation agreement, filed in pursuance of this act with the Secretary of State, and certified by him to be a copy, shall in all Courts and places be presumptive evidence of the consolidation of said two or more companies, and of all the facts therein stated.

"Section 51. Upon making the agreement mentioned in the preceding section, in the manner required therein, and filing a duplicate or counterpart thereof in the office of the Secretary of State, the said two or more corporations mentioned or referred to in the said section shall be merged in the new corporation provided for in such agreement, to be known by the corporate name therein mentioned, and the details of such agreement shall be carried into effect as provided therein.

"Section 52. Upon the election of the first board of directors of the corporation created by said agreement, all and singular the rights and franchises of each and all of said two or more corporations, parties to such agreement, all and singular their rights and interest in and to every species of property and things in action, shall be deemed to be transferred to

and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with all the right of way, and all other rights of property, in the same manner and to the same intent as if the said two or more corporations, parties to such agreement, should have continued to retain the title and transact the business of such corporations; and the titles and the real estate acquired by either of said two or more corporations shall not be deemed to revert or be impaired by means of anything in this act contained: *Provided*, That all rights of creditors, and all liens upon the property of either of said corporations, parties to said agreement, shall be and hereby are preserved unimpaired, and the respective corporations shall continue to exist, so far as may be necessary to enforce the same: *And provided further*, That all the debts, liabilities, and duties of either company shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent and in the same manner as if such debts, liabilities, and duties had been originally incurred by it."

## IV.

### *STATUTE PASSED IN 1883 RECOGNIZING EXISTENCE OF THE MICHIGAN SOUTHERN RAILROAD COMPANY AND AMENDING ITS CHARTER.*

"An Act to amend section five of an act entitled 'An Act to authorize the sale of the Southern Railroad, and to incorporate the Michigan Southern Railroad Company,' approved May nine, eighteen hundred and forty-six.

(Act No. 189, Session Laws of 1883.)

"Section 1. *The People of the State of Michigan enact*, That section five of an act entitled 'An act to authorize the sale of the Southern Railroad, and to incorporate the Michigan Southern Railroad Company,' approved May ninth, eighteen hundred and forty-six, be amended so as to read as follows: The said Michigan Southern Railroad Company shall have full power and authority to locate, and from time to time to alter, change and relocate, so as to not (so as not to) materially change the route, construct, and reconstruct, and fully to finish, perfect, and maintain a railroad with one or more tracks, from some suitable point, at or near the mouth of the ship canal in the city of Monroe, to pass through the villages or towns of Petersburg, Adrian, Hillsdale, and thence to Coldwater by the way of Jonesville, if

deemed the most practicable route, and from thence to Lake Michigan, on the line heretofore established as the line of the Southern Railroad by the State, or anywhere further southward than said line, and also from the junction of the Tecumseh branch with the said Southern Railroad, to pass through the villages of Tecumseh and Clinton to the village of Manchester in the county of Washtenaw, in this State, and to transport, take, and carry property and persons upon said railroad or way, by power and force of steam, or of animals, or of any mechanical, or other powers, or any combination of them which said company may choose to use or apply. And for the purpose of constructing said railroad or way, said company shall have authority and power to lay out, designate, and establish their road in width not exceeding one hundred and fifty feet, through the entire line thereof, and may take, have and appropriate to their use all such lands so designated for the line or construction of said road, upon first paying or tendering therefor, or depositing with the treasurer of the State, subject to the order of the Court which may confirm the inquisition of the jury, such amount of damages as shall have been settled by appraisal, in the manner hereinafter provided, on all such lands as may be taken westwardly from the village of Hillsdale, or northwardly to (of) Tecumseh on the Tecusmeh branch, or upon any new track that may be located by said company, and for the purpose of cuttings, and embankments, and for the obtaining of stone, sand, and gravel, may take and appropriate as much more of land as may be necessary for the

proper construction and security of said road; and for constructing shops, depots, and other proper, suitable, and convenient fixtures in connection with and as appurtenances to said railroad, may take, have, use and occupy any lands on either side of said railroad not exceeding two hundred feet in depth from said railroad, the said company taking all such lands as gifts, or purchasing, or making satisfaction for the same in manner hereinafter provided. This section shall not be construed to restrict or prevent the construction of public roads, or canals, or private ways, under, above, or across the road of said company, when deemed expedient, but so as not unnecessarily to obstruct the same.

"Ordered to take immediate effect.

"Approved June 8, 1883."

## V.

### *GENERAL RAILROAD LAW OF 1873, AND AMENDMENTS TO 1891.*

In 1873, the general railroad law of 1855 was repealed, and a new general railroad law was passed.

It appears as Act No. 198, in the Session Laws of 1873.

It provided for organization of railroad companies, and contained many details which cannot be important here.

The material provisions, with amendemnts down to and including the Act of 1891, in question here, are as follows:

"An Act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this State.

(Act No. 198, Session Laws of 1873.)

### ARTICLE I.

#### ORGANIZATION.

"Section 1. *The People of the State of Michigan enact*, That it shall be lawful for any number of persons, not less than seven, to organize themselves in-

to a corporation for the purpose of constructing, operating and maintaining a railroad, railroad bridge, or railroad tunnel; and for such purpose such persons shall subscribe articles of association, in which shall be set forth the name of the corporation, the number of years the same is to be continued, the amount of capital stock of said company, which shall not be less than four thousand dollars per mile of road constructed, or proposed to be constructed, with flat-bar rail, or with a gauge not exceeding three feet six inches in width, and not less than eight thousand dollars per mile of road constructed, or proposed to be constructed, of 'T' rails with gauge exceeding three and one-half feet in width, and not less than one-half the estimated cost of any such bridge or tunnel; the number of shares of which the stock shall consist, which shall be the amount of one hundred dollars each; the number of directors, which shall not be less than five nor more than fifteen, and their names; the places from and to which, and the name of each county into or through which it is or is intended to be constructed, and its length as near as may be." * * * *

In 1891 Section 3 was added to Article I, and is as follows:

(Act No. 52, approved May 1, 1891.)

"Section 3. Any railroad company incorporated by special charter heretofore granted by the legislature of this State, may surrender such charter and incorporate under this act. Such surrender and incorporation may be effected by the passage of a resolution in that behalf by a vote of two-thirds in interest

of the holders of the stock of such company, at a meeting called and held for that purpose, as hereinafter provided, and filing in the office of the Secretary of State a certificate signed by the president and secretary of said company, and under its corporate seal, containing: (1) A recital of such resolution, so passed by such stockholders; (2) A declaration of such surrender and incorporation; (3) The name by which such new corporation is to be known, which may be the same as the name of such former corporation; (4) The time of existence of such new corporation; (5) The amount of its capital stock, which shall be represented by shares of one hundred dollars each; (6) The total number of shares to be issued to the stockholders of such former company, which shall not exceed the total amount of stock of said corporation then held by said stockholders; (7) The number of directors of such new corporation, which shall not be less than five nor more than fifteen, and the names of the persons selected to act as such directors until the first annual meeting of said new corporation. Upon filing such declaration, such surrender and incorporation shall be deemed to be duly and completely effected; and thereupon all and singular all the railroad and other property, and all rights and interests therein, and all contracts and rights of action theretofore owned or possessed by said corporation so surrendering its charter, shall be deemed to be transferred to and vested in such new corporation, as owner thereof, by like title as the same were theretofore held and possessed by said former corporation; and such new corporation shall

thereafter hold, possess and enjoy the same in like manner and to the same extent as said corporation so surrendering its charter might and could have done if such surrender had not been made: *Provided, however*, That the property so transferred to and vested in such new corporation shall continue subject to all liens existing thereon at the time of such transfer, and such new corporation shall be subject to all debts and liabilities of said corporation so surrendering its charter; and such debts and liabilities may be enforced against such new corporation to the same extent and in like manner as if the same had been originally incurred by it. A duly certified copy of such declaration, so filed in the office of Secretary of State, shall be *prma facie* evidence of the due incorporation of the company named therein. The meeting of the stockholders of any such company, at which the resolution hereby required shall be passed, shall be called by the Board of Directors of such company, by a resolution passed by a majority of said board, at a meeting duly called and held in accordance with the by-laws of said company, and notice of the time when and the place where said stockholders' meeting is to be held, and the purpose thereof, shall be published at least once a week for twelve successive weeks immediately prior to the date of said meeting, in a newspaper of general daily circulation, published in the cities of Detroit, New York, and Chicago, respectively, and also in a news paper published in the city or township where the general office of said company is situated, if not situated in the city of Detroit.

"Approved May 1, 1891."

## ARTICLE II.

### CORPORATE POWERS AND DUTIES OF DIRECTORS.

"Section 1. All of the corporate powers of any such corporation shall be and are hereby vested in the board of directors, except as may be herein otherwise provided. No person except a stockholder shall be a director of said corporation, and no stockholder shall be entitled to vote for directors, or for any other purpose, who shall be in arrears in the payment of any assessment made on his subscription to stock. The president of said corporation shall be elected by the directors from their own number. * * *

"Section 2. It shall be lawful for any company organized under this act, or under any former act for the incorporation of railroads, upon a vote of its stockholders holding two-thirds of its subscribed stock, at any meeting thereof, to alter and amend its articles of association so as to change the general route of said railway, or to extend the length of the line thereof, from either or both of its termini, or to extend any branch or branches from any point on the same, or to change the gauge of its road, or in any other respect not inconsistent with the provisions of this act, as it may determine, and upon such vote said company may make articles amendatory of their original articles, which shall be signed and certified by the president and secretary of said company, and under its corporate seal; and when the same shall be so signed, sealed and certified and filed with the Secretary of State, they shall have the same force and effect as though such alterations or amend-

ments had been included in, and made a part of, the original articles of association. Articles of association filed in pursuance of this act, with all such subsequent alterations and amendments thereof, and the affidavits annexed thereto, shall be forthwith recorded by the Secretary of State, in a book to be provided by him for that purpose at the expense of the company filing the same, and whenever any articles of association shall be filed as above provided, the company filing the same may at once proceed to construct, operate and maintain its railroad or any section or portion thereof, and to exercise its powers and privileges, and also to assess, levy and collect such assessments upon such stock as at that time, and from time to time, may be subscribed for such purpose, as said company shall determine."

* * * * *

"In 1891, by Act No. 90, Section 9 was amended so as to read as follows:

"Section 9. Every such corporation shall possess the general powers and be subject to the liabilities and restrictions following, that is to say: * *

*Ninth.* To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, shall not exceed the following prices, viz.: For a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger

trains, as reported to the commissioner of railroads for the year one thousand eight hundred and eighty-eight, equalled or exceeded the sum of three thousand dollars for each mile of road operated by said company, two cents per mile, and for all companies the earnings of whose passenger trains reported as aforesaid, were over two thousand and less than three thousand dollars per mile of road operated by said company, two and a half cents per mile, and for all companies whose earnings reported as aforesaid were less than two thousand dollars per mile of road operated by said company, three cents per mile: *Provided*, That in future, whenever the earnings of any company doing business in this State, as reported to the commissioner of railroads at the close of any year, shall increase so as to equal or exceed the sum of two thousand or three thousand dollars per mile of road operated by said company, then in such case said company shall thereafter upon the notification of the commissioner of railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half, or two cents per mile as hereinbefore provided; *Provided*, That roads in the Upper Peninsula which report as above provided passenger earnings exceeding three thousand dollars per mile, shall not charge to exceed three cents per mile, and roads reporting less than three thousand dollars per mile shall be allowed to charge not to exceed four cents per mile; *Provided, further*, That one thouand mile tickets shall be kept for sale at the

principal ticket offices of all railroad companies in this State or carrying on business partly within and partly without the limits of the State, at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula. Such one thousand mile tickets may be made non-transferable, but whenever required by the purchaser they shall be issued in the names of the purchaser, his wife, and children, designating the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand mile ticket shall be forfeited to the railroad company. Each one thousand mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used.

"This act is ordered to take immediate effect.

"Approved May 21, 1891."

United States Supreme Court
FILED
MAR 6 1899
JAMES H. McKENNEY,
Clerk

No. 227.

# Supreme Court of the United States

OCTOBER TERM, 1898.

Brief of Pond for P. E.

No. 227.

Filed Mar. 6, 1899.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
HENRY C. SMITH,
Relator.

ERROR TO THE SUPREME COURT OF MICHIGAN.

## Brief of Argument of Ashley Pond for Plaintiff in Error.

The case below was begun by an alternative writ of mandamus requiring respondent to issue to relator an one thousand mile ticket, good for use by himself and wife at any time within two years from the date of its issue.

The relator's claim of right to the issue to him of such a ticket is based upon a statute of the State of Michigan, in the form of an amendment to an act of the legislature of said State, entitled:

"An act to revise the laws providing for the incorporation of railroad companies and to regulate the running and management and to fix the duties and liabilities of all

railroad and other corporations owning or operating any railroad in this State."

The amendment in question, adopted in 1889, is as follows:

"That one thousand mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State, or carrying on business partly within and partly without the limits of this State at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula. Such one thousand-mile tickets may be made non-transferable, but whenever required by the purchaser, they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand-mile ticket shall be forfeited to the railroad company. Each one thousand-mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used."

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The judgment of the court in which the case originated —the Circuit Court for the County of Lenawee—was in favor of the relator, which judgment was affirmed by the Supreme Court, and the case comes here by writ of error to that court allowed by its Chief Justice.

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While concurring in the argument of my associate upon all points covered by his brief, I confine my discussion in this brief to a single proposition, to wit:

The statute in question is violative of the Fourteenth Amendment to the Constitution of the United States in

this, to wit: that its enforcement would operate to deprive the respondent of its liberty within the meaning and intent of said amendment.

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I. That such statute, if enforced, would deprive respondent of its *freedom* to contract is too clear for argument. It seeks to compel railroad companies to enter into contracts with such persons as may demand the same, to carry them and members of their families, at a fixed rate, for the term of two years from the time of demanding such contracts.

But that to deprive one of his *freedom* to contract is to deprive him of his "*liberty*" within the meaning and intent of said amendment is settled by *Allgeyer vs. Louisiana*, 165 U. S., 578.

In that case, a statute which prohibited the contract there in question was held violative of the Fourteenth Amendment upon the ground that the effect of such prohibition was to deprive the defendant of his liberty.

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It is true that that case differs from the case at bar in two respects, to wit:

1. The statute there under consideration *prohibited* the making of the contract in question, while here the statute *requires* the making of the contract.

2. The respondent in that case was a natural person, while here it is a corporation.

But I submit that these differences are wholly immaterial.

1. A statute compelling one to make a contract just as much deprives him of his liberty to contract as does

a statute prohibiting him from entering into a contract. This proposition, I submit, calls for no argument to sustain it.

2. For the purposes of the argument, it may be conceded that a statute prohibiting a corporation to enter into a contract might be valid, while a statute prohibiting a natural person from making a contract of the same kind would be invalid as violative of the Fourteenth Amendment. The reason is clear: The power of a corporation to contract is wholly statutory. It can make such contracts only as by statute it is authorized to enter into. Hence, as the legislature gives the power, the legislature, where power to repeal or amend the charter is reserved, can take it away or restrict its exercise. The only limit to the exercise of the power of the legislature in that regard, if any, is that it must leave with the corporation the right to make such contracts as are vitally essential to enable it to carry on the business to carry on which it was created and exists.

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But to prohibit a corporation from making contracts, and to compel it to enter into contracts, are, I submit, quite different things.

To prohibit the making of a contract, if the prohibition is contained in the charter as granted, is, in effect, to exclude the existence, by implication, of the power. If by way of an amendment to the charter, is in effect the withdrawal of a power theretofore expressly or by implication granted.

While to *compel*, by an amendment to the charter, is to add to the obligations imposed by the charter.

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Obligations may, I do not question, be thus added, but they must, I submit, be such as might, within constitu-

tional principles, be imposed upon natural persons engaged in carrying on the same kind of business. In other words, a corporation, in carrying on the business which it exists for the purpose of carrying on, is as much within the protection of constitutional provisions and principles as is a natural person engaged in the same kind of business.

Undoubtedly, in granting a charter, a legislature may impose such arbitrary conditions as it may see fit. For illustration: in granting a charter for a railroad company, the legislature might make it a condition to the exercise of the franchises granted that the company should carry passengers and property at actual cost, and if corporators could be found to accept such charter the corporation would undoubtedly be bound to comply with the condition. But if a charter should be granted and accepted without such a condition, it could not, I submit, afterwards be imposed, although the charter reserved power to amend. In the exercise of that power the corporation could not be compelled to carry passengers at a less rate per mile than the natural persons, its corporators, could be so compelled were they carrying on the business or like business without corporate organization.

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II. The power of the legislature to enact the statute in question is not attributable to the fact that the parties to be affected by it are corporations whose charters are subject to repeal and amendment.

Such power, if it exists, arises out of the nature of the business carried on by such corporations. It is the same power as that exercised in prescribing the rates to be charged for the transportation of passengers and proprety by common carriers, to wit, that such carriers have voluntarily entered upon a business in which the public

is interested and thereby given the public, represented by the legislature, the right to regulate such business. *Munn vs. Illinois, 98 U. S., 113,* and numerous subsequent cases.

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It follows, I submit, that if the legislature can compel railroad companies to make arrangements such as are here in question, it can, by the same token, compel natural persons, carrying on the business of common carriers, including ferrymen, hackmen, draymen, etc., to make like contracts. It can compel elevator owners to make contracts. whenever applied to in that behalf, to receive and store grain, at a fixed rate, for any definite period in the future.

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It cannot reasonably be contended that a like statute, applicable to natural persons, could be sustained as a legitimate exercise of the police power.

Compelling common carriers, whether corporations or natural persons, to enter into contracts such as are here in question would in nowise tend to the preservation or protection of life, or to the promotion or protection of the health or morals of the public or of individuals, or the promition or welfare, or even the convenience, of the public or individuals, or to prevent common carriers, whether corporations or natural persons, from using their property to the injury of the public or individuals. But legislation to accomplish the objects thus indicated exhausts, I submit, the entire jurisdiction of the legislature under the police power.

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I submit that *Allgeyer vs. Louisiana, supra,* is in point and conclusive against the validity of the statute in question.

III. The scope of the power sought to be exercised by the statute is a strong argument against its possession by the legislature.

1. If the legislature can require railroad companies to make contracts to carry passengers for a fixed rate for two years, it can, I submit, require them to make such contracts for a period of ten years, or twenty years, or more.

2. If the legislature can compel railroad companies to enter into contracts to carry passengers at a fixed rate in the future, it can require them to enter into like contracts to carry freight.

Answering the first of these propositions in a brief presented to the Circuit Court, one of the learned counsel for relator said:

"I concede the conclusion of the learned counsel, only modifying it by the condition that the time fixed *must be within the bounds of reasonable discretion.* (Italics his.)

And the same counsel gave a similar answer to the second proposition.

The theory thus suggested, to wit, that the courts could pass upon the reasonableness of legislation in the direction under consideration, struck me at first blush as somewhat novel, and upon examining Judge Cooley's "Constitutional Limitations," I found it evidently would have been considered novel by him. Here is what he says bearing upon the subject:

"Where the power which is exercised is *legislative* in its character, the courts can enforce only those limitations which the constitution imposes, not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives." *Constitutional Limitations*, p. 154.

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I submit that the judgment below should be reversed.

ASHLEY POND,
Of Counsel for Plaintiff in Error.

# SUPREME COURT OF THE UNITED STATES.

## THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

## HENRY C. SMITH.

### ARGUMENT FOR THE DEFENDANT IN ERROR.

#### STATEMENT OF FACTS.

The facts of this case are these: The plaintiff in error has for years voluntarily sold mileage tickets good for one thousand miles of travel, with the express provision that they should be used by one person only and should be valid for but one year. By Act No. 90, Public Acts of 1891, of the State of Michigan, all railroad companies in said state or carrying on bussiness partly within and partly without the state, are required to keep for sale at their principal ticket offices, thousand mile tickets to be issued in the name of the purchaser, his wife and children, and to be valid for two years at the rate of twenty dollars in the lower and twenty-five dollars in the upper peninsular.

The defendant in error tendered the plaintiff in error twenty dollars and demanded a thousand mile ticket to be issued in the name of himself and wife, and was refused, whereupon Mr. Smith filed a petition in the circuit court for the county of Lenawee praying for the writ of mandamus to compel the issuance of the ticket. The circuit judge granted an order that a ticket good upon the lines of the plaintiff in error in the state of Michigan be issued. Thereupon the plaintiff in error appealed to the supreme court of the state of Michigan, and after more than a year of deliberation, the said supreme court of Michigan affirmed the judgement of the circuit court for the county of Lenawee. And thereupon the said R. R. Company caused a writ of error to be issued out of this court, and now the case is here for its final decision.

ARGUMENT.

The single question of law presented in the case is this: The defendant in error having voluntarily sold milage tickets good for one thousand miles of travel for one person and for one year, can it be compelled by the state of Michigan to issue a precisely similar ticket good upon its lines in said state, not only for the purchaser, but his wife, and for two years instead of one?

It would seem that in this simple statement it would not be possible for such a great legal fight to be made as has been made in this case; but it is safe to say that but few cases that have come to this court from the state of Michigan have been more stubbornly contested and carefully considered than the one now under consideration.

In my opinion, no more important case was ever brought to this court than the present one, for the reason that this great constitutional question is now presented to this court for decision. Have the people of Michigan, through their representatives in the legislature, the constitutional power to control this plaintiff in error who received its life from their hands insofar as relates to the question of rates and tolls which it shall be permitted to exact from passengers over its lines in said state?

From the beginning we have contended that the legislature of Michigan possesses this power of control, and we have been sustained in our contention by the Circuit Judge who first decided the case and afterwards, by a majority of the Supreme Court of Michigan. On the other hand, the learned counsel who represent this corporation, have most vigorously denied that the legislature of Michigan possesses this power, and two members of the Supreme Court, in dissenting opinions, sustained their contention.

It therefore becomes necessary to argue this case at length and give it the careful consideration which its great importance to all the people of the United States demands. But before I enter upon the discussion, let me preface by saying that this act now denounced as unconstitutional, is a law of the State of Michigan, and therefore all of the presumptions of the law are in its favor.—It is presumed to be constitutional. The burden of the discussion therefore rests upon the plaintiff in error; for, in the language of Judge Cooley, "Where courts are called upon to pronounce upon the validity of an act of the legislature, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect and ponder upon it as long as deliberation and patient attention can throw any new light upon the sub-

ject, and *never declare a statute void* unless the nullity and invalidity of the act are placed in their judgments *beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action and the act sustained.*"

With all the presumptions of the law, then, in our favor and the burden of showing its unconstitutionality resting upon our opponents, I proceed to the consideration of the points which have been made by our opponents and the dissenting judges against the constitutionality of said act.

The learned counsel for the railroad company have presented many points; but the courts below, in deciding this case, have ignored most of them and have only thought a very few worthy of any consideration. In his long dissenting opinion, Mr. Justice Grant says:

"Several defences are interposed, but I deem it important to refer to but one, which I think is conclusive against the relator, viz.: Does the legislature possess the power under the constitution of this state to enact this provision requiring railroad companies to fix charges below the maximum rates, and compel them to enter into contracts for two years or for any number of years which the legislature may see fit to prescribe?"

In fact, the record of this case shows that the two great objections to the act challenged upon which counsel and dissenting judges rely, are these:

"*First.* That the legislature of Michigan does not possess the power under the constitution of the state to enact provisions requiring railroad companies to fix charges below the maximum rates, and compel them to enter into contracts for two years.

*Second.* That if it possessed the power generally, in this case it cannot be exercised, because the provisions of the charter of the Michigan Southern Railroad company, granted in 1846, in relation to rates and fares, are still in force and effect, and apply not only to the railroad formerly held and owned by that company, but to this plaintiff in error who, it is claimed, has acquired and succeeded to all the rights, privileges and franchises of that company under said charter, and therefore the act of 1891 does not apply to this plaintiff in error's road

These objections, and all others raised, were, in my opinion, answered by the opinions filed by the majority of the Supreme Court of Michigan, and to which I respectfully refer. But in answering these objections, I have additional points which I desire to argue at length. I claim,

*First.* The legislature of Michigan does possess the power to fix rates and tolls under all circumstances, and that it is immaterial whether a maximum rate has been named or not.

and that requiring the company to issue tickets for two years is clearly a matter of railroad regulation which the legislature possesses; and I claim further, that the legislature of 1846 had no power to contract with the Michigan Southern Railroad Company that it should have the right to fix its own rates and charges for transportation of persons and property, and thereby place it beyond the power of subsequent legislatures to change such rates.

*Second.* That if the legislature of that year did possess the power, it did not exercise it. In other words, the legislature did not make the contract which respondent claims it did make.

*Third.* Admitting for the sake of argument, that the respondent company had the power, and exercised it, then, I contend, that inasmuch as it appears of record that the Michigan Southern Railroad Company, after it received its special charter from the state by taking advantage of a statute of Michigan became consolidated with a corporation of the state of Indiana known as the "Northern Indiana Railroad Company," and thereby formed the Michigan Southern and Northern Indiana Railroad Company, and that afterwards, the said Michigan Southern and Northern Indiana Railroad Company, under due legislative authority in that behalf, entered into consolidation with certain other railroad companies organized under the laws of Indiana, Ohio, Pennsylvania and New York, respectively, and thereby formed the said respondent, the Lake Shore and Michigan Southern Railroad Company; that by reason of such consolidation, the special charter of 1846, granted to the Michigan Southern Railroad Company, was forfeited, and that no provision therein relative to rates and fares have any force or effect whatsoever, and have no application to the respondent in this case.

We will discuss these propositions in their order.

The great constitutional question which I now present to this court, and which I believe it has never decided, is of the greatest possible interest to every citizen of the United States, and is this.

Will this court sustain a charter which purports on its face to grant to a railroad company the right to fix the rate of fares and freight to be charged for the conveyance of persons and property on its railroad, free of all control by the state? In other words has one legislature the power to bind succeeding legislatures by a contract to that effect? This is the exact question raised by *Chief Justice Waite* in *Ruggles v. Illinois*, 108 U. S. 528, and the question was not decided because, on examination of the case the court found that no such grant was intended, and it has never been decided since.

and the question has never been presented to this court to my knowledge.

My position is, that the legislature of a state always has the power to fix said rates, and the extent of judicial interference is protection against *unreasonable* rates. *Chicago, etc., Railroad Company v. Wellman*, 143 U. S. 344; *Stone v. Farmers' Loan & Trust Company*, 116 U. S. 307; *Chicago, Milwaukee, etc. Railroad Company v. Minn.* 134 U. S. 418. That every succeeding legislature possesses the same jurisdiction and power with respect to this question of fixing rates as its predecessor; that the latter has the same power to repeal and modify which the former had to enact, neither more nor less; all occupying in this respect a footing of perfect equality. That this must be so in the nature of things; that it is vital to the public welfare that every legislature should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved, may require.

*Newton v. Commissioners*, 100, U. S. 559.

In other words, I claim the state cannot by contract, divest itself of the power of controlling and regulating rates and tolls to be exacted by railroad companies; that there is now and always has been a limitation upon the legislative power to make such a contract; that the regulation of railroad charges falls under the police power of the state—a power which originally belonged to the people, and was never surrendered by them, and that this police power of the state, essential to its safety, and the protection of all its people, cannot be contracted away; that in all cases arising under this power there can be no contract; no irrepealable law, because it is a *governmental* subject. They involve public interests, and legislative acts concerning them are necessarily public laws.

If this proposition be corret, than the whole claim of the respondent relative to its vested rights, which it secured under the old charter of 1846, which was granted by the State of Michigan to a short line exclusively within its own territory, falls to the ground.

And in support of this proposition, I say:

1. It is conceded that there exists these limitations upon this legislative power, in some cases: That the governmental power of self protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. These are the words of Mr. Chief Justice Fuller in delivering the opinion of the court in N. Y. & N. E.

Railroad Co. v. Bristol, 151 U. S. 567, and he cites, Beer Co. v. Massachusetts, 97 U. S. 25; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Barbier v. Connolly, 113 U. S. 27; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Mugler v. Kansas, 123 U. S. 623; Budd v. New York, 143 U. S. 517.

2. It is likewise thoroughly established by the Supreme Court of the United States, that the inhibitions of the constitution of the United States upon the impairment of the obligation of contracts or the deprivation of property without due process, or of the equal protection of the laws of the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. See 151 U. S. 567. That wherever the preservation of the public safety, public health and public morals is concerned, an act of one legislature granting, in the most positive terms, franchises, rights and privileges, may be repealed by a subsequent legislature, and this notwithstanding the State may have entered into a most solemn contract and on the truth of which millions of dollars may have been invested.

Salus Populi Suprema lex.

It is further conceded that these words of the Chief Justice in the Bristol case, are true, viz.: "That though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression. [Citing] Nashville, etc., Railway v. Alabama, 128 U. S. 96; Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174; Minneapolis, etc., Railroad v. Beckwith, 129 U. S. 26; Dent v. West Virginia, 129 U. S. 114; Charlotte, Columbus, etc., Railroad v. Gibbes, 142 U. S. 386; Minneapolis & St. Louis Railway v. Emmons, 149 U. S. 364."

It is also conceded that it is the settled law of this country that notwithstanding the fact that a legislature may have granted to a railroad corporation the absolute power, in general terms, of fixing rates and tolls, this general grant of power is still nevertheless subject to, and controlled by the common law rule, that the rates and tolls so fixed, *shall be reasonable.*

As Mr. Justice Harlan, in announcing the judgment of the court in Smyth v. Ames, 169 U. S. 544, 545, says: "A railroad is a public highway, created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given

primarily for the benefit of the public. It cannot therefore be admitted that a railroad corporation maintaining a highway under the authority of the State, may fix its rates with a view solely to its own interest, and ignore the rights of the public. * * * A corporation maintaining a public highway, though it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges and franchises subject to the condition that the government creating it, or the goverment within whose limits it conducts its business, may, by legislation, protect the people against unreasonable charge for the services rendered by it. It cannot be assumed that any railroad corporation accepting franchises, rights and privileges at the hands of the public, ever supposed that it required, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit without regard to the rights of the public. The public cannot properly be subject to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority in any case where its power has not been restricted by contract, to proceed upon the ground that the public may not be rightfully required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority."

And Mr. Justice Bradley in Wabash etc. Ry. Co. vs. Illinois, 118 U. S., 586, used these words:

"The highways in a state are the highways of the state. Convenient ways and means of intercommunication are the first evidence of the civilization of a people. The highways of a country are not of private but of public institution and regulation. In modern times, it is true, governments are in the habit, in some countries, of letting out the construction of important highways requiring a large expenditure of capital, to agents, generally corporate bodies created for that purpose, and giving to them the right of taxing those who travel or transport goods thereon, as a means of obtaining compensation for their outlay. But a superintending power over the highways, and the charges imposed upon the public for their use, always remains in the government. This is not only its indefeasible right, but is necessary for the protection of the people against extortion and abuse. These positions we deem to be incontrovertible. Indeed, they are adjudged law in the decisions of this court. Railroads and railroad corporations are in this category." And in many other cases the strongest possible language is used, to show the absolute necessity for the legislature to retain this power of control, in order that the public may not be required to submit to unreasonable exactions.

I assert then, with absolute confidence, that the decisions of this Court sustain to the fullest extent, the proposition that the protection, the safety, the health, the morals, the good order, and the general wellfare of the people, are the chief end of government; that the police power is inherent in the states, reserved to them by the constitution, and necessary to their existence as organized governments; that the police power extends to the control and regulation of things, which, when used in a lawful and proper manner, are subjects of property and of commerce and yet may be used so as to be injurious or dangerous to the public safety, the public health or the public morals, and that it is the settled rule of law in this country, that in all cases involving the public health, the public morals and the public safety, a contract made by one legislature, granting in the strongest possible language, rights and privileges to a corporation, can, at any time thereafter, be changed by the act of a subsequent legislature, and that in all cases where the board of directors of a railroad company, under the charter given to them, have been empowered in general terms, to fix rates and tolls for the transportation of passengers, and the carrying of freight, a subsequent legislature can change these rates and tolls. In other words, can change the express words of the contract which granted the privilege, because this Court has adjudicated that this general grant of power was taken subject to a common-law rule, viz: that the rates so fixed must be reasonable.

But notwithstanding this court has so decided time and time again, it is seriously affirmed in this case that the police power, the aid of which I invoke, has no application to the case at bar, for the reason that a contract with a railroad company relative to the rates and tolls to be exacted from passengers, has nothing whatever to do with life, the public health, the public morals, or the public safety. Therefore, when such a contract, no matter how unfavorable it may be to the state, is once made, the obligations of said contract is forever protected from legislative impairment by the constitution of the United States.

And it is even claimed by one of the dissenting judges that no authorities can be cited which sustain so unlimited a power; that if it be sustained, these companies have no control over their affairs and business, except to carry on such contracts for common carriage as the legislature may see fit to prescribe; that certainly citizens who have invested their money in these corporations are entitled to some control over their business and affairs, and that it is difficult to understand what control is left to them if this law is sustained, and the question is asked, why should the legislature be

authorized to make contracts for the companies, and the judges of our courts determine their reasonableness, when such contracts have no reference to the comfort, safety, or welfare of society? The property of railroads is private property it is said. Neither the state nor the public has a penny invested in them. Private capitalists contributed every dollar to their construction and equipment, and their owners have built them for private profit, and not as public benefactors.

My answer to this proposition is found in the words of this court, over and over again repeated, that while railroad corporations are private corporations, as distinct from those created for municipal or governmental purposes; their uses are public; a railroad is a public highway, created for public purposes; it performs a function of the state, and that when capitalists put their money into the construction of a railroad, they know in advance that they are doing *pro tanto*, the work of the government, and they voluntarily submit themselves to the control of the government, relying upon the good sense and good judgment of the legislative department, and knowing that they can appeal to the courts when an act has been passed which deprives them of the use of their property. In other words, when they can establish the fact in the courts that the law is unreasonable, in this, that it deprives them of a reasonable return on their investments. To exact from a passenger more than a reasonable rate is *extortion*.

We claim that the state, has the right, and it is its duty to prevent extortion. It has been the custom from time immemorial for it to do so.

The state has no power nor moral right to authorize extortion and make this authority extend into the future, either for a number of years, or forever, and thus render future generations helpless to protect themselves against positive evil.

As already stated, common carriers have been subjected to regulation from the beginning. They have not only been compelled to enter into contracts, but some contracts forced by them upon their patrons have been held void as against public policy. At common law a carrier entrusted with goods or money could not agree with the owner that he should not be liable if the goods were stolen from him, for this might lead him to connive with thieves. The law was always used to compel him to receive property and to carry persons without discrimination. His charges have always been fixed by law. This rule was applied to stage coaches and hacks, and is still applied in every city that boasts of anything like civilization.

Is there anything about railrords that should exempt them from the same regulations that have always been applied to other common carriers?

It is claimed that when railroad companies are authorized by their charters to fix their rates of charges up to a certain limit, and they build their roads under these charters, good faith requires that no matter how extortionate the rate may become they should be protected from interference with it. They point to the enormous sum of money invested, and insist upon the sacredness of the original limit as a contract.

Considered from their side alone the argument is plausible. It is like the argument formerly used for the protection of property in slaves. The slaveholder was accustomed to say, "I bought this man and invested my money in him. It destroys my property to make him free."

There is another side to the argument. The man who is compelled to pay a railroad company an unjust and extortionate rate because his father paid that rate at a time when it was reasonable, is robbed, under the forms of law, of a certain amount of his property. The slave who is surrendered up as property is robbed of his liberty.

The principle is clear, although in some quarters its recognition has been imperfect. The right to regulate the business of railroads to some extent has always been conceded.

In the Chicago & Alton R. R. Co. vs. The People, 67 Ill., 11, it was held that the legislature had the power to prohibit unjust discriminations in railway freights.

In Commonwealth vs. Eastern R. R. Co., 103 Mass., 254, it was held that a statute requiring a railroad company to establish a station and build a station house at a certain point on its line, and stop at least two trains a day there, was valid.

In R. R. Co. vs. Fuller, 84 U. S. 710, it was held that a statute requiring railroad companies to fix their rates of compensation annually, and post up the same in their depot buildings, was a valid police regulation. It is common to regulate the speed of railroad trains, especially in cities. It is also common to compel them to fence their roads and to provide safeguards on their cars and at crossings. They have been compelled to use bells and signals to prevent accidents.

Many other police regulations might be cited which have never been questioned.

It is only when the state undertakes to regulate charges that the railroad companies claim a contract power to exact unjust rates, and in doing so, to confiscate the property of their patrons.

I claim that the safety of the state, and the right of all

the people to be protected from extortion, demands that this power of legislation be retained by the state, and that it should be held to be legally impossible to bargain this right of control away for all time, and that no state legislature can enter into a contract by which future generations, by reason of changed conditions, may be compelled to pay unreasonable rates for transportation over railroad lines.

I claim that the subject of rates and tolls being absolutely essential to the welfare of all the people, must always be within, and governed by, the police power of the state, and it can never under any circumstances be bargained away; that it is not the subject of contract to the extent that it can not be, at any time, changed or modified by a subsequent legislature, when it shall appear that the welfare of the people depend upon such a change being made.

It is true that there are a number of cases in this court, where the judges, in writing the opinion, use words which seem to admit that the subject of rates and tolls is open to contract, but I insist that as the exact question has never been decided, these expressions are not authoritative and decisive. And that the cases cited and to be cited hereafter support my position. Am I not sustained in my contention that the fixing of rates and tolls is not the subject of contract, to the extent that a subsequent legislature cannot interfere with it by the application of the rule of law to which I have previously referred, viz: That the rates and tolls fixed by a railroad corporation must always be subject to the common-law rule of reasonableness, though the power to fix said rates may be given in the most positive and unlimited terms in their charter? Does not this common-law rule of reasonablesness always carry with it an implified limitation upon legislative power? Certainly, if the board of directors of a railroad company, under this common-law rule, can be prevented from naming a rate too high when they have been given full power in their charter, by that same token, the law of reasonableless is the supreme law which each and every legislature must recognize. One legislature may grant a charter, and may name a rate which shall be binding upon the parties until the next session of the legislature, at which time, taking advantage of thls common-law rule of reasonableness, the charter can be amended by the second legislature on the ground, and for the reason that either the first legislature had been induced to fix a rate too high, or by reason of changed conditions, it is then too high.

The rule for which I contend is a recognition of the great principle that this power of legislation is a power of government, continuing in its nature, and the state always, within

its own jurisdiction has the power to limit the amount of charges to be exacted by railroad companies.

This principle of continuing governmental control was clearly recognized in the great case of Munn v. Illinois, 94 U. S. 113, decided at the October term of this court, in 1876. That was a case of such magnitude, that in closing the opinion, Chief Justice Waite used these words: "In passing upon this question, we have not been unmindful of the vast importance of the questions involved. This, and cases of a kindred character, were argued before us more than a year ago by most eminent counsel, and in a manner worthy of their well earned reputation. We have kept the cases long under advisement in order that their decision might be the result of our mature deliberations." In this case, the great principle enunciated is "that under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property. That in the exercise of these powers, it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, millers, wharfingers, inn-keepers, and in so doing, to fix the maximum of rates to be made for services rendered, accommodations furnished, and articles sold, and that this limitation by legislative enactment of the rates charged for services rendered in a public employment, or for the use of property in which the public has an interest, establishes no new principle of law, but only gives a new effect to an old one." While Munn v. Illinois has been the subject of comment and criticism, its authority as a precedent remains unshaken, and in Budd v. New York, 143 U. S. 517, the court says: "We must recognize the principle therein maintained as firmly established," and many of the decisions of the State courts of this country affirming and recognizing the principle in the Munn case, are cited.

The police power of the State can be bartered away because under the powers of government inherent in every sovereignty, the State has the power to regulate the conduct of its citizens one towards another, and the manner in which each shall use his own property when such regulation becomes necessary for the public good, and in cases in which property is charged with a "public interest" as in the case of a railroad company, it is within the power of the State to determine the rates and charges which shall be exacted of the public for the use of such property. As was said in the case of Munn v. Illinois, "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affects the community at large."

From the very nature of the property and business of railroad corporations, it follows that those corporations and their property are charged with a public interest, and that they are subject to control by the State. The power under which that control is exercised, is what is commonly known as the police power of the State. As has been seen, this power is inherent in every sovereignty, and cannot be bargained away.

The respondent claims the existence of a contract between itself and the State, by the terms of which, certain special and exclusive privileges are granted to the respondent, the very nature of which, would be to deprive subsequent legislatures of the right to exercise to its full extent, the police power of the State.

These special and exclusive privileges, if any such were intended to be granted to the respondent by the legislature giving to it its special charter, must give way to the police power of the State. That power is the supreme law, to which, when exercised, all contract rights are subservient.

The police power has been defined to be,

"The right of the State functionaries to prescribe regulations for the good order, peace, protection, comfort and convenience of the community which do not encroach upon the like power vested in congress by the constitution."

In the case of Mayor, etc., v. Milne, 11 Peters, 139, the police power is aptly described by Barber, Judge, in the following terms:

"We should say that every law came within this description which concerned the welfare of the whole people of a state, or any individual within it, whether it related to their rights or their duties; whether it respected them as men or as citizens of the State; whether in their public or private relations; whether it related to the rights of persons or of property, of the whole people of a state, or of any individual within it; and whose operation was within the territorial limits of the State, and upon the persons and things within this jurisdiction."

In the leading case of Munn v. Illinois, 94 U. S., 125, Mr. Chief Justice Waite, delivering the opinion of the court, in speaking of the police power, said:

"From this source come the police powers which, as was said by Mr. Chief Justice Taney in the Licence Cases, 5 How, 583, 'are nothing more or less than the powers of government inherent in every sovereignty * * * that is to say, * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property when such regulation becomes necessary for the public good. In their exercise it has

been customary in England from time immemoral, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn keepers, etc., and in so doing to fix a maximum charge to be made for services rendered, acommodations furnished, and articles sold. * * * This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be juris privati only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

Clearly, within these definitions and descriptions of the police power, falls the right of the State to regulate rates, tolls and charges to be taken and made by railroad companies, common carriers and other corporations, or persons engaged in a similar public service. The railroad companies were included within the description found in the case of Munn v. Illinois, is indicated by the language used in that case on page 130, as follows:

"Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. New Jersey Nav. Co. v. Merchants' bank, 6 How. 382. Their business is, therefore, 'affected with a public interest' within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation"

The case of Chicago, Burlington & Quincy R. R. Co., v. Iowa, 94 U. S. 155, bears out the proposition that railroad companies, and regulations affecting them, come within the rule laid down in the case of Munn v. Illinois. In that case it was said:

"Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and, under the decision in Munn v. Illinois, 94 U. S. 113, subject to legislative control as to their rates of fare and freight, unless protected by their charters. * * * This company, in the transaction of its business, has the same rights, and is subject to the same control as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business."

The language above quoted from the Chicago, Burlington & Quincy Railroad Company, was quoted with approval in the case of Dow v. Beidelman, 125 U. S. 687, where the court, continuing (p. 687), said:

"The same rule was affirmed and acted on in several other cases decided at the same time, in the first of which the Chief Justice, in answering 'the claim that the courts must decide what is reasonable, and not the legislature,' said: 'Where property has been clothed with a public interest, the legislature may fix a limit to that which in law shall be reasonable for its use. This limits the courts, as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change."

In the case of Dow v. Beidelman, supra, the court, quoting with approval, from the case of Stone v. Farmers' Loan & Trust Company, 116 U. S. 307, said:

"It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce."

Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 215.

The doctrine of the above cases was affirmed in the case of Chicago, etc., Railroad Company v. Wellman, 143 U. S. 339, where it was said:

"If the contention be that the legislature has no power in the matter, and that an act fixing rates, however high they may be, is necessarily unconstitutional, it is enough to refer

to the long series of cases in this court in which the contrary has been decided. The legislature has power to fix rates, and the extent of judicial intereference is protection against unreasonable rates."

To the same effect is found the case of Georgia Banking Company v. Smith, 128 U. S. 174, where Mr. Justice Field, in delivering the opinion of the court, said:

It has been adjudged by this court in numerous instances that the legislature of a state has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters. * * * and the obligation, assumed by the acceptance of its charter, to transport all persons and merchandise, upon like conditions and upon reasonable rates, affect the property and employment with a public use; and where property is thus affected, the business in which it is used is subject to legislative control. So long as the use continues, the power of regulation remains, and the regulation may extend not merely to provisions for the security of passengers and freight against accidents, and for the convenience of the public, but also to prevent extortion by unreasonable charges and favorism by unjust discrimination. This is not a new doctrine but old doctrine, always asserted whenever property or business is, by reason of special privileges received from the government, the better to secure the purposes to which the property is dedicated or devoted, affected with a public use. There have been differences of opinion among the judges of this court in some cases as to the circumstances or conditions under which some kinds of property or business may be properly held to be thus affected, as in Munn v. Illinois, 94 U. S. 113, 126, 139, 146; but none as to the doctrine that when such use exists the business becomes subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression. In almost every case which has been before this court, where the power of the State to regulate the rates of charges of railroad companies for the transportation of persons and freight within its jurisdiction has been under consideration, the question discussed has not been the original power of the State over the subject, but whether that power had not been, by stipulations of the charter, or other legislation amounting to a contract, surrendered to the company, or been in some manner qualified. It is only upon the latter point that there have been differences of opinion.

For other cases to the effect that the legislature, in the exercise of its police power has the right to fix rates, see,

Ruggles v. Illinois, 108 U. S. 526, 534;

Wabash, etc., R. R. Co. v. Illinois, 118 U. S. 557;
Chicago, Milwaukee, etc., R. R. Co. v. Minn., 134 U. S. 418.
Budd v. N. Y., 143 U. S. 517, 547;
Wellman v. Railway Co., 83 Mich. 592;
Smith v. L. S. & M. S. R. R. Co., 72 N. W., 332.

By the cases cited it is established that one of the important features of the police power is the right of the state to fix the rates, tolls and charges to be taken or made by railroad corporations. The right to fix rates and charges being within the police power of the state, and that police power being absolutely inviolable, it follows that the right and power of the legislature to fix and regulate those rates, tolls and charges, cannot be bartered away. The same limitations surround and the same necessities demand the application of this portion of the police power as surround or demand the application of any other portion of it, and there is, and can be no reason why the right to fix rates, tolls and charges should constitute an exception to the principle that the police power of the state cannot be granted away. It is in the interest of the welfare, and the comfort, and the protection of the property of its citizens that a state is allowed and authorized to make proper police regulations, and it is likewise in the interest of the welfare and comfort and protection of the rights and property of its citizens, that a state is authorized and allowed to, and does fix the maximum of prices for the use by its citizens of property charged with a "public interest." The respondent is a corporation—a creature of the state, existing only by sufferance at the will of the state, which exclusively operates a franchise and property, and carries on a business affecting the State at large, and with which the citizens of the State at large, are obliged to come in contact. In other words, it operates a property which is charged with a "public interest." That being true, its property and rights remain subject to regulation by the State. It is absurd to say that the mere grant to the respondent, of the special privileges it claims, has curtailed or infringed upon the police power of the State. If it can be successfully contended that the State has granted to the respondent the right to fix its own rates and charges, and that a contract in relation to those matters now exists between the State and the respondent, which cannot be impaired by the State, the result is simply appalling. Applying the same principle, and carrying it but a little further; the granting of special charters and special privileges at each successive session of the legislature which would constitute contracts between the State and corporations, would result

in divesting the State of all of its sovereign powers rendering it a state in name only, powerless to attain the principal ends of its existence, viz.: those of securing and protecting the welfare, comfort, health and property of its citizens. It is indeed strange, if the State, to whom the people look for the protection of their private rights, the security of property, and freedom from imposition, is powerless as against this corporation, which owes its very being and existence to, and which has derived all of the rights and privileges which it enjoys and exercises, from its special charter granted by the State. From the very nature of the case it is impossible that the State has given up one of its principal powers of government. Even though language had been used by the State in the charter of the respondent which would create a contract between it and the respondent, still, as had been said, that contract must give way to the police power. The rule is, that all contracts, rights, privileges and property are held subject to that power, and notwithstanding the fact that a contract did exist, that respondent might charge a certain rate for carrying passengers, still, the legislature, in the proper exercise of its police power, could provide for a less rate, and such provision being made, would be the supreme law, to which the alleged contract between the State and the respondent must yield. This proposition is clearly borne out by the language used by Judge Cooley, in his work on Constitutional Limitations, (6 ed., 707), where, in speaking of the police power, he says:

"The occasions to consider this subject in its bearings upon the clause of the constitution of the United States which forbids the states passing any laws impairing the obligation of contracts have been frequent and varied; and it has been held without dissent that this clause does not so far remove from state control the rights and properties which depend for their existence or enforcement upon contracts, as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed important. All contracts and all rights, it is declared, are subject to this power; and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity. Perhaps the most striking illustrations of the principle here stated will be found among the judicial decisions which have held, that the rights insured to private corporations by their charters and the manner of their exercise, are subject to such new regulations as from time to time may be made by the State,

with a view to the public protection, health and safety, and in order to guard properly the rights of other individuals and corporations. Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter-contract, removed from the sphere of State regulation."

To the same effect is the case of Beer Company v. Massachussetts, 97 U. S. 25, where (at page 33), the court said:

"Whatever differences of opinion may exist as to the extent and boundaries of the police power and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, salus populi suprema lex; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

Stone v. Mississippi, 101 U. S. 817;
New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 672;
Prentice on Police Powers, 281, 282.

In the case of Stone v. Mississippi, supra, it was said:

"All agree that the legislature cannot bargain away the police power of a state. 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police."

To the effect that the police power is paramount to contracts in charters, see cases cited in Rapalje & Mack's Digest of Railway Law, title "Charters," Section 25, as follows: Kansas Pac. R. Co. v. Mower, 16 Kan. 573, 9 Am. Ry. Rep. 400. Quoting Nelson v. Vermont & C. R. Co., 26 Vt. 717; Thorpe v. Rutland & B. R. Co., 27 Vt. 140; Lyman v. Boston & W. R. Corp., 4 Cush. (Mass.) 288; Pratt v. Atlantic & St. L. R. Co., 42 Me. 579; Norris v. Androscoggin R. Co., 39 Me. 273; Bulkley v. New York & N. H. R. Co., 27 Conn. 479.

The right and authority to regulate common carriers, and the charges to be made and tolls taken by them, has always been exercised by the several states to prevent excessive and

exorbitant charges and unjust discrimination by common carriers. These are matters in which the public is largely and vitally interested. A railroad is a quasi public corporation, and its charter is granted not merely for the purpose of placing the corporation in a position where it can make money, but the main design is for the public good, and to promote the general welfare of the community and all its rights of eminent domain and all its franchises as a corporation, are delegated and conferred upon it by the legislature as a trustee for that great purpose. Every corporation holds its franchise as every indvidual holds and owns his property, subject to the power of the legislature to make reasonable regulations as to the use of it. The power of the legislature to regulate the tolls of a railroad, is, after all, a part of the police power of the legislative department of the state government; and the test of that power is whatever is necessary to preserve and protect the rights of one citizen without invading the rights of another. Such power being vested in the legislature, being subject to its discretion, and being absolutely necessary for the protection of the people it cannot be parted with by implication merely, if at all.

In the case of Delaware R. R. Tax, 18 Wall. 225, speaking of grants and privileges, the Court said: "All public grants are strictly construed. Nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is that rights, privileges, and immunities not expressly granted are reserved. There is no safety to the public interests in any other rule. And with special force does the principle, upon which the rule rests, apply when the right, privilege, or immunity claimed calls for any abridgment of the powers of the government, or any restraint upon their exercise. * * * The surrender when claimed must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the legislature, that doubt must be resolved in favor of the State."

In the case of Charles River Bridge Co., v. Warren Bridge, 11 Pet. 436, 548, the Court said: "The object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade; and are essential to the comfort, convenience and prosperity of the people. A state ought never be presumed

to surrender this power because, like the taxing power, the whole community have an interest in preserving it undiminished. * * * The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform transferred to the ends of privileged corporations."

In Stone v. Farmers' Loan and Trust Co., 116 U. S. 307, Mr. Chief Justice Waite uses these words: "It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce. This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. [Citing] Railroad Co., v. Maryland, 21 Wall. 456; Chicago, Burlington & Quincy Railroad Co., v. Iowa, 94 U. S. 155; Peik v. Chicago & Northwestern Railway Co., 94 U. S. 164; Winona & St. Peter Railroad Co., v. Blake, 94 U. S. 180, Ruggles v. Illinois, 108 U. S. 526, 531."

Munn v. Illinois, 94 U. S. 113.

And Mr. Justice Brown, in Louisville & Nashville Railroad Co. v. Kentucky, 161 U. S., at page 700, says, it is a general principle of law frequently declared, that where the police power is invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interest, it will be sustained, whenever it can be done without the impairment of vested rights, and the general rule holds good, that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and within legislative control, and in the exertion of such power the legislature is vested with a large discretion, which, if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry, and he quotes from the opinion of Mr. Justice Miller, in Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, where, in delivering the opinion of the court, this great justice says: "While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of such power to the prejudice of the general welfare. These are the public health and public morals.

The preservation of these are so necessary to the best interest of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."

That the police power of the State includes the regulation of highways and bridges within its boundaries has never been questioned. Railroads are public highways. That railroads, though constructed by private corporations and owned by them, are public highways has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had an existence. There are, no doubt, charter contracts and other legislative contracts, but what I maintain is that the legislature cannot confer upon a railroad an irrepealable and unchangable right to regulate its own charges.

As was said in East Hartford v. The Hartford Bridge Co., 10 Howard 511, 533-4, "The parties to this grant, did not by their charter stand in the attitude toward each other of making a contract by it, such as is contemplated in the constitution, and as could not be modified by subsequent legislation. * * * From the standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interests. They changed as those interests demanded."

And in the case of Railroad Commissioners v. Portland and Oxford and Central Railroad Co., 63 Maine 269, the court said: "The public character of railroads further appears from the authority granted to them to exercise the right of eminent domain. No such right is ever granted to banking, manufacturing, or insurance corporations, or to academies, colleges, or hospitals established and conducted by private individuals or private corporations. It is solely because the use of railroads is public that this distinction is made."

And Mr. Justice Brewer, in his dissenting opinion in Budd v. New York, 143 U. S. 517, while criticising the doctrine established in Munn v. Illinois, and dissenting from it, recognizes the principal of governmental control, so far as we seek to apply it in this case. He says, "The vice of the doctrine in the Munn case, is, that it places the public interest in the use of the property upon the same basis as a public use of property. Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity, to-wit: the State, has a right to create and maintain, and therefore, one which all the public have a right to demand and share in. The use is public because the public may create it, and the individual creating it is doing thereby a pro tanto the work of the State. The creation of all high-

ways is a public duty. Railroads are highways. The State may build them. If an individual does that work, he is pro tanto doing the work of the State. He devotes his property to a public use. The State doing the work fixes the price for the use. It does not lose the right to fix the price because an individual voluntarily undertakes to do the work, but this public use is very different from a public interest in the use."

And then the learned justice proceeds to point out the distinction between a railroad, which is a highway and belongs to the public, whether built by the State or by a private individual representing the State, on the one hand, and the use of elevators and warehouses and other forms of private investments which may be used by the public.

The case which I have cited, and the reasonings of the court sustain, I submit to your honors, our contention, that the legislature of 1846 could not, by the charter given to the respondent, prevent a subsequent legislature from changing the rates and tolls therein named.

We submit, that the clause relative to rates and tolls in the charter of respondent, was not, in any sense, a contract within the meaning of the constitution of the United States, but is simply a license which the State, under its police power, and for the protection of the public, may, at any time change, and reduce the rates, so long as it does not undertake to place them below the standard of reasonableness. That no legislature can bargain away the public health or the public morals. That as the supervision of both these subjects of governmental powers, is continuing in its nature, they are to be dealt with as the special exigencies of the moment may require. That the State government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose, large legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. That the distinction is now thoroughly recognized between the contractual and governmental power of the State, to-wit: that the provisions of the federal constitution in reference to contracts, only inhibits the states from passing laws impairing the obligation of such contracts as relate to property rights, but not to subjects that are purely governmental.

We submit, that the regulation of rates and tolls is purely governmental in its nature, and therefore, cannot be bargained away.

We further submit, that all the reasons assigned by this Court in a number of decisions, as their justification for setting aside binding contracts contained in charters granted to railroad companies, by which, in the strongest, though in general language, the power was given to the directors to fix

rates and tolls apply with equal force to this case, because if you can change the rate of fares and tolls when once fixed by the board of directors, under a power given them in these words, "the directors are hereby authorized to fix such rates as they may deem to be reasonable," by the application of the common-law rule of reasonableness, you can invoke the same rule of law to change the rates at any time when they shall be deemed to be unreasonable, no matter what the words used in the charter by which the directors are given power to fix the rates.

SECOND PROPOSITION.

Assuming that the legislature of 1846 possessed the power to enter into a binding contract with respondent, by which it could have divested the State of all power over the subject of rates and tolls, and given this power absolutely to the respondent company, then I say that this power was not exercised, and I claim that there is not one word, or clause, or sentence in the entire act, which justifies the claim that is now made, and has been made for the last 50 years by representatives of the respondent corporation, that this power was given to them.

If I have not conclusively established the claim that this power can never be exercised, I certainly have demonstrated that, whenever it is claimed that the power has been exercised, it must be established by the clearest possible language, and if there is any doubt whatever, in regard to the matter, the doubt must be resolved in favor of the State, and against the corporation.

This is such an elementary rule of law that it seems entirely unnecessary to cite any decisions in support of it. However, I will quote a few.

In Ruggles v. Illinois, 108 U. S. 531, Chief Justice Waite used these words: "Grants of immunity from legitimate government control, are never to be presumed; on the contrary, the presumptions are all the other way, and unless an exemption is clearly established, the legislature is free to act on all subjects within its general jurisdiction as the public interests may seem to require. As was said by Chief Justice Taney, in speaking for the court, in Charles River Bridge v. Warren Bridge, 11 Pet. 420, 'it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created.' This is an elementary principle."

In Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, it is decided that the right of a state to reasonably limit the amount

of charges by a railroad company for the transportation of passengers and property within its jurisdiction, cannot be granted away by its legislature, unless by words of positive grant or words equivalent in law, and that a statute which grants to a railroad company the right from time to time to fix, regulate and receive tolls and charges by them to be received for transportation, does not deprive the state of its power, within the limits of its general authority, as controlled by the constitution of the United States to act upon the reasonableness of the tolls and charges so fixed and regulated. That this power of regulation is a power of the government, continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant or something which is in law equivalent. If there is a reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall, in Providence Bank v. Billings, 4 Pet. 514, 561, "its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon t does not appear." This rule is elementary. And then the Chief Justice proceeds to point out special cases to illustrate the principle, as follows: "The incorporation of a bank without any special provision for taxation did not imply a contract on the part of the state not to tax at all," and quotes from the Delaware Railroad tax case, 18 Wall. 206, using these words: "The surrender of this power of the state, when claimed, must be shown by clear, unambiguous language which will admit of no reasonable construction consistent with the reservation of the power," and quoting from Bailey v. Maguire, 22 Wall. 215, "Silence on such a subject, that is to say, taxation for other purposes, cannot be construed as a waiver of the right of the state in this regard. There must be something said which is broad enough to show clearly that the legislature intended to relieve the corporation from a part of the burdens borne by other real and personal property." And in Fertilizing Company v. Hyde Park, 97 U. S. 659, where the company had been incorporated with authority to establish and maintain chemical works for fifty years, one of the reasons assigned by the court in deciding that it was not thereby prevented from causing the works to be abated in case they should become a public nuisance, was this: The absence from the charter of any express exemption of the company from the operation of the powers of the state applicable to its existing conditions for the time being.

And in Newton v. Commissioner, 100 U. S. 548, 562, where the seat of justice of a county had been fixed at Canfield, and the statute by which this was done provided that before the seat of justice shall be considered permanently established at Canfield, the citizens should donate a lot and make certain

provision for the erection of public buildings thereon. The citizens complied with all the requirements of the law and the seat of justice remained undisturbed at the place where it had been permanently established until 1874, when a law was passed for its removal to another town. The citizens of Canfield then caused a bill to be filed for an injunction restraining the county commissioners from effecting the removal, on the ground that the original act, and what was done under it, constituted an executed contract on the part of the State that the seat of justice should remain forever at Canfield, and the latter act impaired the obligation of that contract. The court held otherwise, saying, "If the legislature had intended to assume an obligation that it should be kept there in perpetuity, it is to be presumed it would have said so. We cannot, certainly not in this case, interpolate into the statute a thing so important which it does not contain." And the Chief Justice then proceeded to point out that the cases in which it had been held that a contract was entered into, are equally instructive. Thus in Gordon v. The Appeal Tax Court, 3 How. 133, the statute was that "upon any one of the banks of the State complying with the conditions of this act, the faith of the State is hereby pledged not to impose any future tax or burdens on the said banks during the continuance of their charter under this act." Home of the Friendless v. Rouse, 8 Wall. 430, the provision was that all property of said corporation shall be exempt from taxation, and that a certain existing statute to the effect that every acting corporation shall be subject to alteration and repeal, "shall not apply to this corporation." And on page 330, Chief Justice Waite says, "The right to fix reasonable charges has been granted, but the power to declare what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power, it would have been easy to say so. Not having said so, the conclusive presumption is there was no such intention." Quoting from the opinion of the Supreme Court of Mississippi, in Railroad Commissioner v. Yazoo & Mississippi Valley R. R. Co., 62 Miss. 607, these words are used: "A grant in general terms of authority to fix the rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation which shall be just and reasonable. It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation that the power of the legislature afterwards to interfere, can be denied."

These cases all establish what Chief Justice Waite states as an elementary rule of law, that the abandoment of power

of regulation by the government ought never to be presumed in any case in which the deliberate purpose of the statute to abandon it does not appear. Such being the rule, we need only to apply this rule to the special provisions of the charter under consideration to show that there is not one single word in this charter which justifies the claim that there has been an abandonment of this governmental power. On this point, I think Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174 is decisive. It seems to me that this case is on all fours with the case at bar, and absolutely decides this case. The facts were that by an act of the legislature of Georgia passed in 1833, the Georgia Railroad Company was incorporated and empowered to construct a rail or turnpike road, etc. In the 12th section of its charter, among other things, are found these words: "The said Georgia Railroad Company shall at all times have the exclusive right of transportation or conveyance of persons, merchandise and produce over the railroad and railroads to be by them constructed while they see fit to exercise the exclusive right: Provided, That the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles, and five cents per mile for every passenger." Forty-six years thereafter, the legislature of Georgia passed an act providing for the regulation of railroad, freight and passenger tariffs to prevent unjust discrimination and extortion in the rates charged for transportation of passengers and freights, and to prohibit railroad companies from charging other than just and reasonable rates. Thereupon the company filed its bill, in which it was contented, among other things, that the charter of the company was a contract between it and the State of Georgia, and that by it the company had the right to charge any rate for freight and passengers not exceeding those limited in the 12th section of its charter, and that the act was in conflict with the clause of the constitution of the United States which prohibits a State passing any act impairing the obligation of a contract.

Your honors will see that this case is a case precisely like the case at bar, involving the same legal principles, the provisions in the charter relative to charges are almost identically the same as ours, and no legal distinction, in my opinion, can be drawn between the two cases.

Mr. Justice Field, in announcing the judgment of the court, used these words on page 179: "It has been adjudged by this court in numerous instances that the legislature of a State has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the

company constituting a contract vesting in it authority over these matters, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation, and that what is done does not amount to a regulation of foreign or interstate commerce. So long as the use continues, the power of regulation remains, and the regulation may extend, not merely to provisions for the security of passengers and freight against accidents and for the convenience of the public, *but also to prevent extortion by unreasonable charges and favoritism by unjust discrimination.* This is not a new doctrine, but old doctrine always asserted whenever property or business is by reason of special privileges received from the government, the better to secure the purposes to which the property is dedicated or devoted, affected with a public use.

There have been differences of opinion among the judges of this court as to the circumstances or conditions under which some kinds of property or business may be properly held to be thus affected, but none as to the doctrine that when such use exists the business becomes subject to legislative control in all respects necessary to protect the public against danger, injustice or oppression. The question then arises whether there is in the 12th section of the charter of the plaintiff in error, a contract that it might make any charges within the limits there designated, and the language of Justice Field may be used as well in our case as in the case which he was deciding. The first clause of the 12th section would seem to have been framed upon the theory which obtained very generally at the date of the charter, that a railroad was subject, like an ordinary wagon road, to the use of all persons who were able to place the necessary conveyances upon it. It was then generally supposed that whilst the company constructing the road was the owner of the roadbed, any one could run cars upon it upon payment of the established tolls and following the regulations prescribed for the management of trains; and some charters granted at that period contained schedules of charges for such use. In considering the clause, and the words following the word "provided," he says: "The general purpose of a proviso as is well known is to exempt the clause covered by it from the general provisions of a statute or from some provisions of it, or to qualify the operation of the statute in some particular, but it is often used in other senses. But it does not matter in the present case whether the term be construed as imposing a condition on the preceding exclusive grant to the company of the privilege of transporting passengers and merchandise over its own roads, or be considered merely as a conjunction to an independent

paragraph declaring a limitation upon the charges which the company may make. If considered as a condition to the enjoyment of the exclusive right designated, then the section only provides that so long as the maximum of rates specified is not exceeded, the company or its lessee shall have the exclusive right to carry passengers and merchandise over its roads. It contains no stipulation, nor is any implied as to any future action of the legislature. If the exclusive right remains undisturbed, there can be no just ground of complaint that other limitations than those expressed are placed upon the charges authorized. It would require much clearer language than this to justify us in holding that notwithstanding any altered conditions of the country in the future, the legislature had, in 1833, contracted that the company might for all time charge rates for transporting passengers and property over its line up to the limits there designated. It is conceded that a railroad corporation is a private corporation, though its uses are public, and that a contract embodied in terms in its provisions or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts. If the charter in this way provides that the charges which the company may make for its services in the transportation of persons and property shall be subject only to its own control and limit designated, exemption from legislative interference within that limit will be maintained. But to effect this result, the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the State. There is no such language in the present case. The contention of the plaintiff in error therefore fails."

Now, if your Honors please, I claim that this decision I have just given, decides this case; that the facts of the case are on all fours with this; that the language contained in the charter is precisely the same.

In the brief for respondent, reference is made to the fact that in the case of Georgia R. R. & Banking Co. v. Smith, the exclusive right granted was only for 30 years, and had expired at the time the proceedings in that case were instituted. It will be found from an examination of that case, that the exclusive right granted was the right to use its own road. At the time that exclusive right was incorporated into the charter, it was generally supposed that while the company constructing the road, was the owner of the road bed, anyone could run cars upon it, upon payment of established tolls, and following the regulations prescribed for the management of trains, but in the language of the Supreme Court in that case (page 180), "this notion has long since

been abandoned as impracticable." The question, therefore, of whether the exclusive right to use its own road had been granted, and whether or not that exclusive right had expired, was immaterial, as the road had the exclusive right without any grant to that effect, and after that grant had terminated.

This theory of the case is recognized in the case of Commonwealth v. Covington & Cin. Bridge Co., supra, 54 Am. & Eng. R. R. Cases, 461, 469, where it was said: "It is argued that in the case of Georgia R. R. & Banking Co. v. Smith the period for which the charter was to run had expired, and the court was discussing the power of the legislature to enact a law regulating the tolls after the expiration of the grant. Such could not have been the question involved; for if the grant had expired, no doubt could arise as to the power of the legislature over the question. It was a decision upon the one question, and that was: Did the terms of the grant to the Georgia Banking Company create a contract?"

Although difficult for the counsel for the respondent to make any concessions in this case *they must concede*, that it is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation, that the power of the legislature afterwards to interfere, can be denied.

It remains then, simply, for us to apply this rule to the language of this charter, to see if this unmistakable manifestation appears from the language used. Counsel for respondent claim that it does not appear because of the insertion of the maximum clause. Let us then consider this case on principle for a moment, without present reference to the binding authority of the case of Georgia Railroad and Banking Co. v. Smith, 128 U. S. 174, let us consider the question as to whether the insertion of a maximum clause in the contract, has any tendency to support the claim that this makes a contract by which the railroad company can fix rates and tolls free from legislative interference.

"That the several states have the right to fix, either directly through an act of the legislature or indirectly through a commission, reasonable maximum freight and passenger rates upon traffic wholly within their borders is settled. Chicago, Burlington & Quincy Railroad v. Iowa, 94 U. S. 155; Peik v. Chicago & Northwestern Railway, 94 U. S. 164; Chicago, Milwaukee & St. Paul Railroad v. Ackley, 94 U. S. 179; Winona & St. Peter Railroad v. Blake, 94 U. S. 180; Illinois Central Railroad v. Illinois, 108 U. S. 541; Railway Commission Cases, 116 U. S. 307; Wabash, St. Louis & Pacific Railway v. Illinois, 118 U. S. 557; Dow v. Beidelman, 125

U. S. 680; Covington etc. Turnpike Co. v. Sandford, 164 U. S. 578."

As I understand the position of counsel, they admit that a subsequent legislature would have power to lower the rates fixed in their charter, if the clause relative to three cents a mile had not been inserted. Of course, then, the single question is, for what purpose was this clause inserted in the contract? What was its object? The correct answer to this question is this. *The sole object of the insertion of the maximum rate in railroad charters, is to protect the state, and the people of the state from extortion.* A simple permission to railroad companies to charge an amount which the legislature fixed upon as a reasonable amount for the time being.

But counsel for the respondent say that because this clause was inserted in the contract as we have seen, for the protection of the state, they can use that clause for their interests and exact from each and every passenger a higher rate of fare than is reasonable, it being admitted that a two (2) cent rate is reasonable.

Let me ask each of the members of this Court, and let me ask the counsel who represents the respondent, which of two forms of contract they would regard as more favorable for their clients in a case like the following: There are a number of capitalists that contemplate the building of a railroad, and they are willing to invest their money in the enterprise, provided they can get a charter from the State which would be satisfactory to themselves. Let us suppose that one of the counsel for this railroad company is charged with the duty of getting as favorable a charter from the legislature as possible, and he afterwards calls a meeting of the capitalists in question, and submits this proposition to them. He says, "Gentlemen, I can announce to you that I can secure from the legislature of this State either one of the following contracts:

1st. The directors herein named are hereby authorized to fix such rates for the transportation of passengers, and to charge such tolls for freight as they see fit.

2d. The directors herein named are hereby authorized to fix such rates for the transportation of passengers, and to charge such tolls for freight as they see fit, provided that they shall not charge more than three cents a mile for passengers, and provided that they shall not charge more than a certain rate of tolls for freight."

Now, I ask the Court, I ask the counsel which of these two propositions, taking the words as they stand without present reference to the common law principle, they would regard as more favorable to the capitalists, and which he would advise them to adopt.

Can there be any question, if your honors please, but

what he would advise the acceptance of the first proposition? He certainly would, because it gives the directors full and complete power over the whole subject of rates and tolls, and to charge what they please.

But the second expressly limits this power, by the express declaration that under no circumstances during the existence of the charter can they charge more than three cents a mile. But, as we have seen, the courts, for the sake of saving the State from extortion invoked, in the first class of cases, the aid of a great common law rule, and they decided that when the power was given in broad and general terms in the charter, it is subject to the proviso, that the rates must be reasonable, because this corporation, although brought into existence by the investment of private means, receives its life from the State, and the work that it is engaged in is of a public character, because it is a great public highway for the use of the people, and the public are the first parties to be considered, and the interests of the people are paramount to the dividends of stock-holders, and therefore the Supreme Court of the United States declared, that (although it would seem from this language that there was an unmistakable intent on the part of the State to give to the gentlemen named as the incorporators of the road the power to fix the rates without any restraint whatever) the legislature did not have the power to do so, or rather, if the power to do so exists, at all, that the legislative intent is not established by the use of general terms.

Compelled then, by this ruling, to abandon the claim of power to fix rates from what would appear to any one, who can understand the English language, to be the more favorable of the two propositions, the learned counsel for the respondent now claim that when this broad sweeping delegation of power to the incorporators of the road is limited by the proviso that they shall not charge more than three cents a mile, that that makes a solemn contract by which they can, for all time, be permitted to charge three cents a mile, whereas, in my opinion, nothing can be more untrue, because the sole and only purpose for which that proviso was inserted into the contract was to protect the State and to limit the general grant of power which it was thought at the time would be given were the clause left out.

The insertion of the clause amounts simply to this: A legislative declaration that, as circumstances are now, we think if you charge up to the limit that we have made, that that would not be unreasonable; that that would not be unjust to the people of this State, and consequently we authorize you to charge up to the limit until such a time, as by reason of changed conditions, the charging of the maximum amount

named in the contract would be unreasonable by reason of the fact that you would then exact more from passengers than a just return upon your investments would warrant.

By reason of the changes brought about by new inventions, new discoveries and the application of electricity, that which would be reasonable as a maximum rate fifty years ago would be unreasonable now. The legislature, by this clause, reserves to itself the power of changing the maximum rate in order to conform to the changed conditions.

"TO DETERMINE RATES UPON THE BASIS OF REASONABLENESS."

And I repeat, that this element of reasonableness is so essential to the public welfare that it follows that the legislature cannot imperil it by entering into an absolute contract with railroads, authorizing them to charge a certain rate for toll for many years in the future, and thereby place it beyond the control of subsequent legislatures to save the people from extortion in case the rate fixed by the prior legislature was unreasonably high, it being essential to the public safety that the government should have absolute control over the entire subject of rates and tolls, and it is not in the power of the legislature under any circumstances by the use of any terms or phrases whatsoever, to enter into an absolute binding contract by which tolls of a certain amount may be exacted, free from all legislative interference.

To the same effect is the case of Peik v. Chicago, etc., R. R. Co., supra. In that case, the company was, by its charter authorized:

"To demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall deem reasonable."

The contention was made by the railroad company that this language constituted a contract between it and the State, giving to it (the railroad company) the exclusive right to fix its own rates and charges.

It was there held that that language did not constitute a contract between the State and the railroad company as was claimed for it.

In the case of State v. So. Pac. R. R. Co., cited supra, the language of the statute was that the railroad company:

"Shall have the power to collect and receive such tolls or freight for transportation of persons and property thereon as it may prescribe."

It was there held that this provision did not constitute a contract between the State and the railroad company, the obligation of which could not be impaired by subsequent legislation.

In the case of Commonwealth v. Covington & Cincinnati Bridge Co., supra, the language of the charter was:

"That the president and directors shall have the right to fix the rates of toll for passing over said bridge, and to collect the same from all and every person or persons passing thereon with their goods, carraiges, or amimals, of every description or kind. * * * And the said president and directors shall, from time to time, reduce the rates of toll, so that the net profits of said bridge shall not exceed 15 per cent per annum, after the proper deductions are made for repairs and charges of other descriptions."

An act was subsequently passed prescribing a lower rate of tolls to be charged and taken by the defendant company. The company refused to comply with the terms of the act, claiming that it was unconstitutional, and a violation of the contract contained in its charter. It was there held that the original charter provisions did not constitute a contract between the corporation and the state, the court saying (p. 465):

"We have found no decision of the Supreme Court since this question *as to the right of a state to surrender these governmental powers has been mooted*, where private property has been devoted to public use under legislative grants, in which that court has construed the grant as containing stipulations precluding the state from exercising any control over the rates or charges the citizen is required to pay for its use. * * * [469] The state does not bind itself by saying in express terms or by fair implication that no reduction of tolls shall be made to lessen this rate of interest or the net profits on the investment. There is no contract or agreement in this charter by which the state has agreed that this company shall forever impose such a burden on travel, if it sees proper, as will yield 15 per cent on the investment. The proviso is only a limitation on the rights and privileges previously granted, and to say that because a limit is designated it creates a contract is not sanctioned by reason of authority."

The facts presented in the last mentioned case were subsequently discussed and reviewed in the case of Covington & Cin. Bridge Co. v. Kentucky, 154 U. S. 204, and the subsequent act reducing the tolls and charges was held to be unconstitutional and void as an infringement upon the constitutional powers of congress to regulate commerce. The doctrine of the opinion in that case does not in any way detract from the force of the opinion of the state court upon the question material here, as the question of whether a contract had been created between the state and the defendant was not questioned or decided. The dissenting opinion concurred in by four of the judges, considered the question of a contract, not

between the corporation and the state, but as between the states of Ohio and Kentucky.

By force of decisions and principles everlastingly true, counsel for respondent are driven from their position, that the insertion of the maximum clause established the intent which they claim. Its sole object and purpose was just the contrary,—*To protect the State from extortion.*

Counsel for respondent in all of their researches have not been able to cite one single decision of this court, to either support the proposition that rates and tolls are the subject of contract, or that any language such as used in the charter under discussion, establishes the legislative intent to divest the State of the power of control, and they only cite one decision of the State courts, upon which they seem to rely. I refer to the case of Stone v. Yazoo & Mississippi Valley Railroad Co., 62 Miss., 607, and even in this one single, solitary case, which they have found in the judicial history of the United States to support their contention that rates and tolls is a subject of contract to such an extent that it cannot be changed by an act of a subsequent legislature, the court uses these words: "A grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation which shall be just and reasonable. It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation, that the power of the legislature afterwards to interfere can be denied. It is not to be presumed that the right of legislative control was intended to be renounced. Every presumption is against that. If the grant can be interpreted without ascribing to the legislature the intent to part with any power, it will be done. Only what is plainly parted with, is gone."

Now, if your honors please, assuming that this single decision is to be received as the law of the case, let us see just what the exact language of the charter in that case was, and we will find that it was entirely different from the language of the charter in the case at bar.

The power to fix rates and tolls is found in section 6 of the Mississippi charter, and reads as follows: "Be it further enacted, that said company shall have and possess the power of fixing from time to time by its board of directors, the rates at which it will do express and telegraph business, and shall transport other express companies, as may apply for transportation over its line, at a just and reasonable rate of compensation, and also the rates at which said company will transport persons and property over its railroad and branches.

Provided, said last mentioned rate shall not exceed four cents per mile for each passenger, nor exceed the following rates of freight. * * * But in no case shall the railroad company be limited to a less charge than twenty-five cents for the transportation of each passenger, parcel, package or article, however short the distance. The rates so established from time to time by the said board of directors for transporting persons or property as a railroad company not exceeding the maximum rates for railroad busines as above set out, MAY BE CHARGED AND COLLECTED BY SAID COMPANY."

Here, then if your honors please, are words not only showing the intention of the legislature to protect the State by the limitation that no fares shall be charged exceeding four cents per mile, but there is also the express legislative agreement that the maximum rate shall not be changed but that during the existence of the charter, four cents might be charged and collected. The clause contains both a limitation, and an affirmative grant of power.

## EFFECT OF SECTION 37.

The decisions which I have now referred to establish the proposition that the language used in the respondent's charter does not constitute a contract between the respondent and the State. That no words contained in the act show an express legislative intent to put it beyond its power to regulate the rates and charges to be made by the Michigan Southern Railroad Company, reading the act without reference to section 37. But the respondent claims that the language of its charter does not come within the decisions referred to, because in section 37 of the charter these words are found:

"The State reserves the right at any time after 30 years from the passage of this act, by a vote of two-thirds of each branch of the legislature, to alter, amend, or repeal the same: Provided, That said company shall be compensated by the State for all damages sustained by reason of such alteration, amendment or repeal."

But the complete answer to that claim is this: There is nothing whatever in Section 37 which evidences the intent of the legislature to apply it to the provisions of the charter relating to the rates and charges of the railroad company; and unless it was clearly the intention of the legislature to thus apply the provisions of that section, it could not have such application. Without that section, the right of the State over the rates and charges of the Michigan Southern Railroad Company, under the decisions of the Supreme Court

of the United States are plenary; and the mere fact that the State has, in Section 37, in order to protect itself, reserved the right to amend, alter or repeal, thereby evidencing its intention to place a limitation upon, and not to extend the rights granted to, the respondent, should not be allowed to militate against the State: And such its operation will be, if the contention of the respondent is sustained.

Section 37 has no reference to the governmental question of rates and tolls, but to the rights, privileges and immunities which are secured to the railroad company in said charter by contract,—among them being the right to exist as a corporation to the exclusive use of its roadbed, the right to issue bonds, the right to acquire property by eminent domain, the right to establish its road, etc. As was said by Mr. Chief Justice Waite, in the case of Stone v. Mississippi, supra,—

"It is not the charter which is protected, but only the contract the charter may contain. If there is no contract, there is nothing in the grant on which the constitution can act. Consequently, the first inquiry in this class of cases always is, whether a contract has, in fact, been entered into, and if so, what its obligations are."

If the power to contract with reference to rates and tolls did not exist, or was not exercised, then, certainly Section 37 of the act does not refer to rates and tolls: And, as we are confident that the court will find the first, and certain, it will find the second to be true, I feel that I would be justified in paying no further attention to Section 37. But I again ask what was the object or purpose of inserting this paragraph in the act? The first words of the paragraph are a sufficient answer, viz.: The State reserves the right to repeal, alter or amend the charter, etc. The circumstances were most peculiar. This was not a case of giving a charter to build a road, but, in part, a contract to sell a road, already constructed,—built and owned by the State. Provision had already been made by which the State, after 21 years, might buy the road back on paying the amount stated in the contract; and then to provide for the safety of the State in case it was thought best not to buy back, Section 37 was inserted by which after 30 years the charter could be repealed, altered or amended. And as our half million dollars was the purchase price, and millions more would be expended in the course of 30 years, it was right that some provision should be made by which the stockholders should be awarded such damages as they could show had been sustained by taking from them those exclusive privileges which were the subject of contract. And here, again, in the determination of what was the subject of contract, we invoke the elementary rule,

that all doubts must be Resolved in favor of and not against the State.

Everything connected with and surrounding this charter points clearly, logically and forcibly to the fact that the legislature, in granting it, could not have intended to part with its complete and plenary power to regulate and alter the rates and charges to be charged and taken by the railroad company.

Stone v. Farmers' Loan & Trust Co., supra;
Ill. Cent. R. R. Co. v. Ill., 108 U. S. 541.

In construing this charter it becomes necessary to examine and consider the history of the respondent railroad company and its line of road, the circumstances and conditions surrounding it, and the relation of the State thereto, at the time that the charter was granted. Such examination and consideration leads to the conclusion that Section 39 of the charter was to have no application whatever to the provision that the company may regulate its own rates and charges within certain limits.

This section was the outcome of the particular circumstances surrounding the granting of the respondent's charter, and the reservation of the right to re-purchase, and was intended to be applied only to those rights, powers and privileges which were necessary to preserve and continue the existence of the respondent company as a corporation, which do not include rates, tolls and charges. Under it those rights, powers and duties are preserved from legislative interference except upon a compensation being rendered therefor. The right to repurchase was reserved to the State, and the method of arriving at the price to be paid by the State was set forth in the charter, and that price was made to depend particularly upon the market price of the stocks and bonds of the company.

Therefore, there being no provision in the charter of the Michigan Southern Railroad Company securing to it the right to fix and regulate the rates and charges it will make, independent of legislative interference or control, it follows that the legislature has the right to fix rates for that company, subject, however, to the limitation that those rates shall be reasonable: And it is not claimed that the rates fixed by the legislature in the act of 1891, are unreasonable.

## THIRD PROPOSITION.

If the court should not agree with me upon either of the two propositions which I have argued at length, *I then insist that the judgment of the Supreme Court of Michigan should*

*be affirmed because, by consolidation with several other companies, the old Michigan Southern Railroad Company voluntarily surrendered its charter of 1846.* The Michigan Southern Railroad Company, when first constructed, was but a few miles in length, and wholly in the State of Michigan. It received its charter from the State of Michigan in 1846, which, among other things, granted to said road certain immunities, privileges and exemptions. It was for the directors and stockholders of this road to determine whether they would retain these immunities, privileges and exemptions and continue to run the little road in Michigan; and further, to determine whether the benefits which would result from consolidating with other roads would more than offset what they would lose in giving up said special immunities, privileges and exemptions. They determined that they would gain more by consolidation than they would lose.

I insist that from that moment, from the moment they took advantage of the Michigan law, namely, General Laws of Michigan for 1855, it must be held that the company elected to surrender its special privileges; for clearly, the company cannot claim all of the immunities, privileges and exemptions of a single Michigan road operating under a special charter, and at the same time all of the immunities, privileges and exemptions of the laws of the several States under which the great truuk system now running from Buffalo, N. Y., to Chicago, Ill., was created, and of which the portion in Michigan now forms a very small part.

The old Michigan Southern Railway Company, by entering into a new corporation, elected to become subject, not only to all the express terms and provisions of the law enabling it so to do, but also subject to the express provisions of the constitution of Michigan of 1850, which was in force at the time of such consolidation.

Section 50 of the act of 1855, under which the consolidation took place, contains this clause "and such new corporation shall possess all the powers, rights and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of their respective charters or laws of organization *not inconsistent with the provisions of this act.*"

Section 1 of Article XV of the state constitution reads as follows: "Corporations may be formed under general laws. All laws passed pursuant to this section may be amended, altered or repealed."

Section 33 of the laws of 1855 provides "The legislature may, when any railroad organized under this act is opened for use, from time to time alter or reduce the rates of toll, fare, freight, or other profits upon said road," and here the

words of Justice Field in Attorney General vs. Old Colony Railroad, 160 Mass., 95, may be adopted, simply substituting the words Michigan Southern Railroad Company in place of the words Old Colony Railway Company. With this change, it would read as follows: "Moreover, I am of opinion that the Michigah Southern Railroad Company, by accepting the benefit of legislation subject to the general laws which give the legislature the right to revise its fares, rates and charges, has lost its right, if it ever had it, to interpose the provisions of its original charter against the statute which assumes in a reasonable way to regulate or reduce its fares."

I repeat what I have said before in this argument, that there was nothing transferred by the act authorizing the consolidation, except the property of the company and the franchise and power and right to exist and do business as a corporation: that the legislature of 1846 had no power to bargain away the right of control over rates and fares; that if it did have a right it did not exercise it, and if it did have a right and had exercised it, then, they were extraordinary and special immunities and exemptions which pertained solely to the old Michigan Southern Railroad Company, and did not pass to the new road, because they were not specifically enumerated and mentioned in the statute so that the intent so to do would be established beyond any reasonable doubt.

St. Louis & San Francisco R. R. Co. v. Gill, 156 U. S. 649.

Shields v. Ohio, 26 O. St., 86; affirmed in 95 U. S., 319.

Railway Co. v. Commissioners, 112 U. S., 622.

R. R. Co. v. City of Grand Rapids, 102 Mich., 378.

Morgan v. Louisana, 93 U. S., 217.

Louisville & Nashville R. R. Co. v. Palmes, 109 U. S., 244.

Wilson v. Ganes, 103 U. S., 417.

Memphis & L. R. R. Co. v. Ry. Com'rs, 113 U. S., 609.

St. Louis & Iron Mt. Ry. Co. v. Ry. Com'rs, 113 U. S., 465.

Chespeake & O. Ry. Co. v. Miller, 114 U. S., 176.

As these cases are decisive of the point for which we are now contending, I will not further discuss the third proposition.

In the conclusion of this argument, I contend that there is no force whatever in the position taken by counsel and by the dissenting judges that the statute of Michigan is void because it seeks to compel this respondent to sell a mileage book good for two years. The propositions are elementary

that the legislature can compel any railroad company which received its life from their hands to accept and carry a passenger when he tenders the proper fare, for the reason that the legislature has created such companies for the very purpose of carrying such passenger; and by accepting its franchise from the State to carry on this public business, which the State itself might do, it agreed to be controlled by the State on all matters relative to the transportation of passengers, to enter into contracts which the legislature might determine were just, and to submit themselves to all reasonable conditions and terms pertaining to every material element of the contract for transportation. The only limitation in this power of legislative control, is this: that the conditions and regulations prescribed by the legislature shall be reasonable; and this principle applies as well to the length of time in which the owner of the ticket shall use it as to the price he pays for it.

As I regard these questions as settled by the decisions of this court, I shall not argue them further.

I respectfully ask that the judgment of the Supreme Court of Michigan in this case be affirmed.

FRED A. MAYNARD,
*Attorney for Defendants in Error.*

No. 227.
Brief of Smith for Appellee.

SUPREME COURT U. S.
FILED
MAR 6 1899
JAMES H. McKENNEY,
Clerk.

# BRIEF OF APPELLEE.

Filed Mar. 6, 1899.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 227.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY,

*vs.*

HENRY C. SMITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF FOR APPELLEE, BY HENRY C. SMITH, IN PRO PER.

(16,778.)

(16,778.)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1898.**

No. 227.

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IE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY,

*vs.*

HENRY C. SMITH.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

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RIEF FOR APPELLEE, BY HENRY C. SMITH, IN PRO PER.

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*Statement of Facts.*

he Circuit Court for the County of Lenawee, Michigan, issued andamus, after a full hearing, requiring respondent to issue sell to relator a one-thousand-mile ticket for twenty dollars, n which he and his wife could ride. Such a ticket is proed for by Act 90 of the Public Acts of the State of Michigan 1891, which requires railway companies to sell one-thousande tickets to a man and his wife and the members of his ily, for twenty dollars in the Lower Peninsula and twenty- dollars in the Upper Peninsula. The Supreme Court of higan sustained the lower Court.

he present Constitution of the State of Michigan, adopted ratified in 1850, vests in the Legislature the power to regu- the charges of the railway companies for carrying pasgers.

he original charter of the Michigan Southern Railway Com-y, passed in 1846, permitted that company to charge a rate hree cents a mile for carrying passengers.

fter the adoption of the present Constitution, the Michigan thern Railway Company applied to the Legislature of the te of Michigan for authority to consolidate with a railroad

company of Indiana, which authority was given by the Michigan Legislature.

Respondent contends as follows:

(1) That this Statute under which relator was given such ticket is an attempt on the part of the Legislature to provide for the sale of mileage good outside of Michigan, which affects interstate commerce, and for this reason, that the law is unconstitutional.

(2) That by reason of its ancient charter, it has a right to charge three cents a mile, and that its charter is in force, and that as this charter was granted before the amendment to the Constitution, that this Statute in question impairs the obligation of their contract under their charter, and, therefore, is invalid.

(3) That the Act is unconstitutional for the reason that it is an attempt to compel railroad companies to enter into contracts to be performed in the future, and is an invasion of the right to the use of the property, and is in violation of the fourteenth amendment to the Constitution of the United States.

(4) That the amendment to the Constitution of the State of Michigan, Article 19 a, Section One, is a limitation upon the power of the Legislature to legislate as to rates, and limits the right to fixing maximum rates and not minimum rates.

The decision of the Michigan Supreme Court, 4th D. L. N., page 662, October 1st, 1897, states relator's position clearly and sustains his contention fully.

I will only discuss the propositions growing out of the consolidation of respondent, and will leave the others to be discussed by Attorney General Maynard.

After this case had been started by relator, and had been pending for some time, the Commissioner of Railroads and the Attorney General of the State of Michigan adopted the case on behalf of the State, and under the provisions of a concurrent resolution, passed in 1893, the State has carried on the litigation to test the charter of respondent, the question being of public importance.

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## ARGUMENT.

In the lower courts, counsel for respondent raised several technical preliminary questions. It was claimed that inasmuch as relator's petition did not expressly limit the ticket asked for to respondent's lines within the State of Michigan, that it must be understood that he demanded a ticket good over all of its lines, including those in other States, and that the order of the Court limiting the ticket to its lines within the State of Michigan, was without authority.

It was also claimed that relator only demanded a ticket upon the railroad *owned* by respondent, and that the order of the Court calling for a ticket upon the lines *operated* by

it within the State of Michigan, was too broad, for the reason that it operated a part of its line under a perpetual *lease*, and not as *owner*.

It was clearly understood and agreed by counsel for the parties at the hearing in the Circuit Court, that these preliminary questions, and the question of a demand by relator for a ticket, after the order to show cause was made, were waived. And the Honorable Circuit Judge so certifies. (Record, p. 15.)

Those questions were discussed in the Supreme Court, however, and I will argue them briefly.

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As to the point that the order of the Court limited the ticket to the lines within the State of Michigan, being less relief than that petitioned for in the original application, we reply it is now the settled practice of this Court to grant a part of the relief prayed for even though the right to the whole is not established upon the hearing.

As this Court said in

Hosier *v.* Higgins, Township Board, 45 Mich., 342.

"There is no good reason for distinguishing in this regard between mandamus proceedings and other actions where a complete cause of action is made out less than the whole claim. We have discarded the old rule which seems to have prevailed under a different form of procedure, and which some of the earlier decisions of this Court adopted. We do not deem it applicable under the constitutional provision which has given this Court plenary jurisdiction in mandamus cases. Such remedies should be applied rationally."

The same rule was applied in

Bryant *v.* Moore, 50 Mich., 226.

Under the constitutional amendment of 1893, Act 12, p. 434, and the rule of this Court adopted in conformity to such amendment, the Circuit Courts of this State now have the same plenary power as formerly practiced by this Court in mandamus cases.

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Before passing this point, we here suggest that if this Court in its final determination shall hold that the old

Michigan Southern charter is still in force, and entitles the respondent to charge three cents per mile over that old road, such charter certainly does not enable the other lines operated by respondent within this State to charge that amount.

Lake Shore Ry. Co. *v.* Grand Rapids, 102 Mich., 374.

If the Court shall find the only objection to granting this writ, to be the old Michigan Southern charter, then we insist that this Court will at least either modify, or direct the Court below to modify, its order by compelling the ticket to be issued over all the lines operated by respondent in Michigan other than the old Michigan Southern Railroad. And we so ask the Court, in case we are not entitled to the whole.

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This question may be further considered under

## THE INTERSTATE COMMERCE QUESTION.

Respondent contends that the 1891 statute "is a regulation of interstate commerce and is void."

We deny it.

The terms of the statute *limits the ticket to the State of Michigan.*

It fixes the price of the ticket, "*not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula.*"

It is common knowledge and of which the Court will take judicial notice, that respondent's lines in Michigan are all confined to the Lower Peninsula.

Under such a state of facts, and of the statute in question, it must be presumed that when relator demanded a one thousand mile ticket and tendered twenty dollars that he was only asking for such a ticket as the statute required, viz.: In the Lower Peninsula of Michigan.

Indeed his petition shows that his demand referred to the statute.

Certainly when the petition was filed referring to the statute, there could be no possible excuse for any pretended claim that a ticket good without the State was asked. But to obviate any possible misunderstanding, relator filed an express disclaimer (Record, p. 13), that he had asked or desired a ticket over any lines except those in the Lower Peninsula of Michigan.

We insist that there is not a decision of any Court that holds such a case to be a regulation of interstate commerce.

Even the case cited by the learned counsel, Mr. Pond, (Wabash Ry. *vs.* Illinois, 118, U. S., 557,) in his brief filed in the Michigan Supreme Court, expressly holds such a statute to be valid.

Attorney General *v.* Boston & Albany Ry., 160 Mass., p. 81,

is also directly in point.

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## IS THE ORDER TOO BROAD?

As to the objection raised by the learned counsel on page 33 of his brief, in Michigan Supreme Court, under point six, we call the Court's attention to the holding of this Court in the Wellman case, that Act 90, Sec. 9, of 1891, in question, does not apply to the owners of the roadbed, but it has reference to the company *operating* the railroad.

Quoting from the brief of the learned counsel Mr. Webber, on page 610, 83d Michigan:

"Every railroad in the State having now any considerable mileage is made by a union of companies—that is, different portions of the road were constructed under different and separate charters—but the *ownership of the passenger trains, and the practical ownership and control of the railroad*, is vested in the company which *operates* it; and this law under consideration * * * must have referred to the companies *operating the railroads*, and it cannot be held to apply separately to each particular company, whether general or special, by authority of which the road was originally constructed."

This Court adopted Mr. Webber's construction of the statute.

And as we have already said, when relator asked for a ticket as provided in this statute, he asked for such a ticket as the statute authorized, and on such of respondent's lines in Michigan as the statute referred to—which includes all the lines *operated* by respondent in Michigan.

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As to the seventh point, found on page 35 of counsels brief, in the Michigan Supreme Court, that the Act is so indefinite as to be inoperative:

It seems to us that Railroad Companies, desirous or willing to comply with the statute, will find no difficulty in

interpreting it, and in issuing tickets in accordance with it. One thousand mile tickets, and the common terms upon which they have been issued are well understood, and there is no pretense that the ticket asked by relator shall vary from that in common use by the respondent, except as specifically mentioned in the statute.

And we submit that if any Railroad Company insists upon obstructing the statute, that the courts will have no difficulty in enforcing it by suitable process.

In this connection, the case of

Attorney General *v.* Old Colony Ry., 160 Mass., 62,

is instructive.

The statute under consideration in that case reads as follows:

"Sec. 1. Every railway corporation operating within this commonwealth shall provide and have on sale, for twenty dollars, mileage tickets, representing one thousand miles, which shall be accepted and received for fare and passage, etc."

The above quotation is the only description of the ticket given in the statute.

Paragraph 9, Section 9, of the law under consideration in our case reads:

" * * * * that one thousand mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State * * * at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula."

Then the statute further specifies certain things that the ticket shall contain.

It will be seen that the ticket provided for by this State is, if anything, more definite and specific than that provided in Massachusetts.

The Massachusetts case was discussed with great learning in the opinions filed, and resulted in a divided Court.

The Massachusetts act was held invalid for two reasons, and *two only*. Three of the five members held that the clause making the ticket good on every railroad within the commonwealth was invalid because it appropriated property to the public use without the owner's consent, and without legal provision for a reasonable compensation therefor.

2d. Because one railroad was permitted to fix the terms of the contract, which other roads were bound to accept.

The point contended for by three of the Justices was that the act compelled one railroad company to accept in

payment for transportation, the contract or promise of another railroad company, regardless of the question of the financial responsibility of such company.

The two dissenting Justices, in a very able opinion, insisted that the probability or possibility of pecuniary loss to one corporation in carrying passengers on the credit of another company, is infinitesimal, and that the objection was too theoretical and speculative to be considered as a violation of the constitution.

It is significent that none of the Justices deemed the question of the indefiniteness of the ticket mentioned, of any importance, and made no reference to that question.

We will have occasion to refer to this case again under each of the two main questions to be discussed hereafter.

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## ACT 123, LAWS OF 1891.

As to the fourth point made by counsel for respondent, argued on page 31 of his brief, in Michigan Supreme Court:

We submit that the criticisms of the learned counsel upon the act mentioned, No. 123, Laws of 1891, are not well taken.

It is possible the person who drafted the law may not have used as elegant rhetoric as the learned counsel of the Lake Shore & Michigan Southern Railway Company would have used; nevertheless, we submit that the meaning is very plain. The phrase, "may have been," criticised by him, is not open to the objection raised.

The meaning of that phrase plainly is: "may have had its being;" "may have had its existence;" "may have had its life;" "may have had its authority to act;" "by means of the consolidation."

Second. This act purports to amend an act entitled, "An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities of all railroads and other corporations owing and operating any railroad in this State."

So we say that the title to the act is fully as broad as that of the General Railway Law itself, and no broader.

Section 49, in terms, provides for bringing all railroads, and railroad companies operating railroads within this State, within the provisions of the general law to which this section is added.

Section 50 does not add anything to Section 49, except that it exempts certain railroads from certain provisions of Section 49, until a certain date fixed, hence it is not a

statute for "imposing a tax," or "revising a tax," in the sense used in the constitution. Nor is it open to the objection that it does not state the object to which the tax shall be applied.

Section 1 of Article 14 of the Constitution provides as to how all specific taxes shall be appropriated.

Wolcott *v.* People, 17 Mich., 63.
Westinghausen *v.* People, 44 Mich., 265.

So we say that Sections 49 and 50 do not refer to any *other law*, but only refer to certain sections of the same General Railroad Law, to specify the tax, viz.: a specific tax—all the sections of this General Law must be read together, including those added by the amendment.

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The authorities cited by the learned counsel under this branch of his argument, (page 32 of his brief filed in Michigan Supreme Court,) as to when a former statute will be repealed by a subsequent statute, certainly can have no weight when applied to this case.

Section 51 of this act provides, "*that all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.*"

This language is certainly broad enough and sweeping enough to cover every former act of the Legislature, whether local or general, which is inconsistent, or in conflict with the General Railway Laws of this State.

If our contention, made further along in this brief, as to the result of the consolidation constituting the corporation known as the Lake Shore & Michigan Southern Railway Company, is found correct, then the necessity of this amendment Act 123 is not very apparent, except as it may bear upon the question of taxation.

The tax cases reported in 46th and 53d Michigan, and referred to by the learned counsel for respondent in brief in Michigan Supreme Court, seem to have induced the Legislature to declare, and give expression to its understanding and intention, that all railroad companies in this State, whether theretofore claiming to operate under special charters or otherwise, shall be taxed alike; and if the mode of taxation authorized under any of the old charters is inconsistent and in conflict with the mode prescribed by the General Railway Law, then such former provisions are repealed by this amendment, and such was the plain intention of the Legislature.

The law is pointed directly at the old special charters of every road claiming to be operating under them.

This intention is not only manifested by the general repealing Section No. 51, but in Section 49 the Legislature uses very specific language, viz.:

"And any *franchise, right, power, privilege, immunity or exemption,* claimed by any such railroad or railway company of a kind which would not belong to a company organized under the General Railroad Laws of the State as now existing or as hereafter amended, is hereby *annulled and abrogated;* and every such company shall be subject to all the restrictions and perform all the duties now imposed by the general laws or which may hereafter be imposed upon railroad companies."

If the title to the act which this amends, viz.: the General Railroad Law—is broad enough to include the matter of taxation of roads incorporated under it, as it manifestly is, then it is a startling proposition to say that an act amendatory of that law should or *could* embrace either in its title or the body of the amendments any subject foreign to the original act.

The provision of the charter requiring the State to pay all damages sustained by the Railroad Company, by reason of the repeal, is not a condition precedent to the repeal.

That proviso merely acknowledges such liability as may be established by proof after the repeal takes effect.

It must be presumed that the repealing act was passed with this contingent liability in view.

It is not an actual fixed liability which the Legislature was, at that time, called upon to provide means to meet, nor has it been, at any time since, called upon to appropriate or provide means to liquidate a liability that is only contingent or possible.

If the old Michigan Southern Railroad Company, and its charter, was in fact in existence, which we deny, at the time of the passage of Act 123, Laws of 1891, and any damage has followed by reason of the repeal of the act, it is for the Company to present its claim and have fixed whatever that liability may be, and then it will be the duty of the State to pay it.

And it must be presumed that the State will pay all its just obligations.

There can be no *presumption* that the Railroad Company has been damaged because it is required to operate its road under the general law of the State, rather than under a special charter. The fact that the general law of the State, as amended in 1891, Act 90, reduces the rate of fare from three cents per mile to two cents per mile, does not create

a presumption that such reduction damages the Company; that it either increases its expenses or diminishes its revenues.

And upon this question we cite

Wellman *v.* Railroad, 143 U. S., 339.

On page 343, the Court say: "Must it be declared as a matter of law that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings?"

It must be borne in mind that the Legislature by the repeal has not deprived the respondent of the power to do business. On the contrary it substituted another franchise with many privileges and immunities not formerly held by the old Michigan Southern Company.

Indeed when the time comes to assess damages because of the repeal, if respondent shall ever ask damages, it will be seen that respondent has, in all probability, received and appropriated a *quid pro quo* for every immunity, privilege or exemption voluntarily released by it.

Under the circumstances and history of this repeal, and of the attitude assumed and insisted upon by the respondent ever since the amendment was passed, the respondent is in no position to complain because damages have not been paid or tendered.

Respondent has all this time refused to accept the situation, it refuses to admit or recognize the repeal, not because damages have not been tendered or paid. It refuses to present any claim. It repudiates the entire amendment because it claims the act is unconstitutional.

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## THE OLD MICHIGAN SOUTHERN CHARTER.

Before taking up the merits of this point it may not be amiss to reply to the suggestion of the learned counsel Mr. Pond, in his brief filed in the Michigan Supreme Court:

"That as late as 1883 the Legislature of the State assumed that the charter of the Michigan Southern Company was still operative, as in that year it passed an act amending Section 5 of said charter. (Sess. Laws 1883, p. 206.)"

We submit that this amendment cuts no figure in this discussion.

1st. It is apparent from the terms of the amendment

that its passage was desired and secured by the present respondent, the Lake Shore & Michigan Southern Railway, and for its exclusive benefit. It is, for that reason, fair to presume that it was dictated in the office of respondent's general counsel.

Now, if the passage of that amendment was sought for the purpose now suggested in this argument, viz.: *a recognition of the existence of the old charter*—it is quite safe to presume that no such purpose was disclosed to the members of the Legislature.

2d. In no event can it have any force as a declaration of legislative intent.

3d. Whatever effect it may have ever had, it certainly is no longer in force.

Act 123 of 1891 laws, clearly shows the understanding of the Legislature, and very clearly expresses its intention to settle any and all former disputes and contentions and misunderstandings as to all the old charters of every railroad in this State.

Such clearly expressed intention of the Legislature must be and is the end of the law, if it violates no principle of the State or Federal Constitution.

In his brief in Michigan Supreme Court, the learned counsel, Mr. Greene, also refers to this charter and relies upon its provisions and their transfer to the respondent as a defense, under two heads of his argument, viz.: his *Second Point* and *Fifth Point*.

The argument of the learned counsel under both of these heads is based upon the allegation in respondent's answer.

The paragraph of the answer relied upon is as follows:

Par. 5. "And the said Michigan Southern & Northern Indiana Railroad Company, afterwards, under due legislative authority in that behalf, entered into consolidation with certain other railroad companies organized under the laws of Illinois, Ohio, Pennsylvania and New York respectively, and *thereby formed the said respondent, the Lake Shore & Michigan Southern Railway Company;* and this respondent thereby acquired all the rights, franchises, powers and property of said Michigan Southern Railroad Company, and of the said Michigan Southern & Northern Indiana Railroad Company, and holds and is entitled to all the rights, franchises, powers and privileges granted in and by the charter aforesaid, and by the acts of the Legislature of said State, to said Michigan Southern Railway Company and the said Michigan Southern & Northern Indiana Railroad Company."

Par. 6. "That under and by virtue of the said charter of the said Michigan Southern Railroad Company, to all

the rights, franchises and powers of which, respondent has succeeded, the said Michigan Southern Railway Company had the power and authority to charge and did charge and fix the rate for the transportation of passengers over its railroad at *three cents per mile.*"

Counsel after referring to the answer then adds: "This allegation stands admitted upon the record in this case." (P. 25 of brief.)

On page 33 of brief in Michigan Supreme Court, under heading "Fifth Point," counsel again says:

"And as appears indisputably upon the record in this case, the respondent has acquired and succeeded to all the rights acquired or held by that Company under and by virtue of that charter."

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The claim that these allegations of the answer stand admitted as allegations of fact and are therefore conclusive, is by no means true.

They are not allegations of fact, at all.

They are mere allegations of legal conclusions, of what the law is—of what the statute contains. They are allegations of matters which the Court will judicially know whether correct or incorrect.

If those allegations had been denied, an issue of fact would not have been raised for a preliminary determination by a jury.

It is a startling proposition that respondent in its answer showing cause, can conclude and settle a question of law, or statutory construction, by an allegation not denied—when all that is needed to disprove the allegation is reference to the statutes of our own State.

It will be seen that the answer alleges that this transfer was made "*under due legislative authority in that behalf,*" and of course refers to the General Railroad Laws of 1855.

Section 50 contains this clause:

"And such *new corporation* shall possess all the powers, rights and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of their respective charters, or laws of organization, *not inconsistent with the provisions of this act.*"

The italics are ours.

It is true that Section 52 of the same act again provides for transfer of the franchise, etc., from the *old corporations* to the *new corporations* and does not add the clause, "*not inconsistent with the provisions of this act,*" as does Section 50.

But it is nevertheless true that these two sections must be construed and read together—and that the limitation being in the statute clearly and specifically limits the transfer.

Because of the express limitation, and the *thereby* clearly expressed intention of the Legislature, as to how much and what portion of the old charter, franchise and privileges were transferred to the new consolidated corporation, the authorities cited by the learned counsel for respondent on pages 26, 27 and 44 and 45 of their brief in Michigan Supreme Court have no application.

The statute does not leave the question open for "presumption," but by its express terms excludes every immunity and exemption not consistent with the act under which the consolidation is made.

Section 33 of the Railway Laws of 1855 provides, "the Legislature may, when any railroad organized under this act is open for use, from time to time, alter or reduce the rates of toll, fare, freight or other profits upon said road. * *"

The old Michigan Southern Railway by entering into a *new corporation* consented to become subject not only to all the express terms and provisions of the law enabling it so to do, but also subject to the express provisions of the Constitution of Michigan of 1850, then in force.

Section 1, Art. 15, reads as follows:

"*Corporations may be formed under general laws.* * *

*All laws passed pursuant to this section may be amended, altered or repealed.*"

It is plain that the respondent, the *Lake Shore & Michigan Southern Railway*, has no right to operate a foot of railroad or do an act within the State of Michigan except as it is so authorized by the General Railroad Law, which enabled the Michigan corporation to become part of it.

And it seems to us equally plain that so long as respondent assumes to act at all, and claims the right to operate railroad lines in Michigan, that it must submit itself to and obey all the provisions of that law.

To use the language of the learned counsel, Mr. Pond, in Michigan Supreme Court:

If the Michigan Southern Railway Company was "fool enough" to enter into a consolidation in face of the provisions and conditions incorporated in the law authorizing the consolidation, it "will of course be bound by the conditions." (Brief, p. 66.)

These conditions must continue to be binding so long as the Michigan Southern Railway consents to and continues to avail itself of the provisions of the consolidating law, which is the General Railroad Law

Nor is there anything inequitable or unjust in this proposition.

If the old Michigan Southern Railroad Company would insist upon retaining such immunities, privileges and exemptions as are inconsistent with the law under which respondent is now operating in the State of Michigan, it must withdraw from the consolidation, surrender the benefits and privileges that it obtained by the act of consolidation, and return to its old incorporation and its old charter, provided such corporation and charter are still in existence.

Whether it could do this without the consent of the other corporations that entered into the combination with it and formed the new corporation, is a matter of no consequence and has no bearing upon the case at bar.

If it should ever attempt to do so, however, it is not difficult to see that there would be many obstacles standing in its way.

Upon the point last discussed, we again call the Court's attention to the language of the Court in

Atty. Gen. *v.* Ry., 160 Mass., *supra.*

The Court says:

"In view of the many changes in the charters of nearly all the railroad corporations of the commonwealth since the year 1870, which have been *accepted* by the corporations, it may well raise a doubt whether these corporations have not *consented to be subject to* any laws which the Legislature under its general powers, may constitutionally enact concerning fares or tolls."

Opinion of Field, J., on p. 85.

Again on page 95:

"Moreover I am of the opinion that the Old Colony Railway Company, by accepting the benefit of legislation, subject to the general laws, which gives the Legislature the right to revise its fares, rates and charges, has lost its right, if it ever had it, to interpose the provisions of the original charters against the statute which assumes, in a reasonable way, to regulate or reduce its fares. * * * I am therefore of the opinion that the petitions should not be dismissed on the ground that the statute impairs the obligations of contracts securing to the defendant's immunity from reduction of fares."

Opinion of Justice Knowlton.

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From the many decisions that directly and indirectly

bear upon the questions as to what franchises, privileges, immunities and exemptions pass from one corporation to another under the authority of legislative acts, it is apparent that two things must be constantly kept in view: First. The *intention of the Legislature*; and, Second. *The power of the Legislature* under the constitutional provisions in force at the time of the transfer.

It may be entirely apparent that the legislative act authorizing the transfer intended that the new corporation, organized for the purpose of receiving the property and franchise of the old, should have every franchise, right, privilege, immunity and exemption formerly held by either of the old companies, yet, if at that time, the constitutional restrictions prohibited the new corporation from holding the former franchises, immunities and exemptions, then the legislative intent would not prevail, it must yield to the constitutional prohibition.

So we insist that at the time of the organization of the Lake Shore & Michigan Southern Railroad Company, in 1869, and at the time of the passing of the law of 1855, authorizing the formation of such Company, the constitution provided,

"Corporations may be formed under the general laws. * * All laws passed pursuant to this section may be amended, altered or repealed." (Sec. 1. Art. 15.)

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There is another principle of law well established which has an important bearing upon the question as to what was intended to be transferred to the consolidated company, under the terms of the general law of 1855.

We insist that there was nothing transferred by that act except the property of the company, and *the franchise and power and right to exist and do business as a corportion.*

That such special immunities and exemptions as remained and were held by the old Michigan Southern Company, and not common to other railway companies, would not have been tranferred even though the law authorizing the transfer did not expressly limit it to such franchise and privileges as were "not inconsistent with the provisions" of the 1855 law.

It is our contention that the immunities and exemptions *from reduction of fare and taxation*, were extraordinary and special immunities and exemptions, which pertained, solely, to the old Michigan Southern Railway Company, and that in order to tranfer such immunities and exemp-

tions they must be *specifically enumerated* and mentioned in the statute.

Upon this question we call the Court's attention to

Railway Co. *v.* City of Grand Rapids, 102 Mich., 378.
Morgan *v.* Louisiana, 93 U. S., 217.
Wilson *v.* Ganes, 103 U. S., 417.
Louisville & Nashville Ry. Co. *v.* Palmes, 109 U. S., 244.
Memphis & Little Rock Ry. Co. *v.* Ry. Commissioners, 113 U. S., 609.
St. Louis & Iron Mountain Ry. Co. *v.* Ry. Commissioners, 113 U. S., 465.
Chesapeak & Ohio Ry. Co. *v.* Miller, 114 U. S., 176.

As was well said by Justice Mathew, concurred in by the entire bench, in

Railway Company *v.* Commissioners, 112 U. S., 622.

"It is immaterial that the form of the transaction is that of a sale, mortgage, or other transfer *inter partes* of the franchise to be a corporation.

The real transaction in all such cases of transfer, sale or conveyance, as was said by the Supreme Court of Ohio, in the case of State *v.* Sherman, 22 Ohio State, 411–428, in legal effect is nothing more or less and nothing other, than a surrender or abandonment of the old charter by the corporators and grant *de nova* of a similar charter to the so-called transferees or purchasers.

To look upon it in any other light and to regard the transaction as a literal transfer or sale of the charter, is to be deceived, we think, by a mere figure or form of speech. *The vital part of the transaction, and that without which it would be a nullity, is the law under which the transfer is made.* The statute authorizing the transfer and declaring its effect, is the grant of a new charter couched in a few words, and to take effect upon condition of the surrender or abandonment of the old charter, and the deed of transfer is to be regarded as mere evidence of the surrender or abandonment."

The cases above cited were questions where special exemption from taxation was claimed.

The same principle was held and applied to a case where a special immunity from the reduction of the *rate of fare* was insisted upon, in the following case:

St. L. & San Francisco Ry. Co. *v.* Gill, 156 U. S., 649.

This was a case where certain railways in Arkansas were consolidated with another railroad company incorporated

under the laws of Missouri, in which the opinion was rendered by Justice Shiras and concurred in by the other Justices.

The Court say, at the bottom of page 656:

"It has been frequently decided by this Court that a special statutory exemption or privilege, such as *immunity from taxation or a right to fix and determine rates of fare,* does not accompany the property in its transfer to the purchaser in the absence of express directions to that effect in the statute."

Citing the above authorities.

The Court again say:

"As is said in the Supreme Court of Arkansas in the present case, (54 Arkansas, 101,) the corporation owning the several parts of road to which it is charged that the act operates unjustly, was dissolved years before it was passed. As to these it could not operate unjustly and in their behalf no cause of complaint can exist."

This authority effectually disposes of the contention of the learned counsel for respondent, that the old corporations do not and can not be said to be dissolved and a new corporation formed by a consolidation of different railroads incorporated under the laws of two or more States.

The case of

Shields *v.* Ohio, 26 Ohio State, 86,

and the same case reviewed by the United States Supreme Court, reported in 95 U. S., 319, is in full harmony with the case last above referred to.

This was a case involving the right of the present respondent, the Lake Shore & Michigan Southern Railway Company, to charge a higher rate than that fixed by the general statute of Ohio.

The effect of the consolidation of the several corporations into the Lake Shore & Michigan Southern Railway, this respondent, was fully discussed.

The Constitution of Ohio, at the time of the consolidation in 1869, contained a provision very similar to Section 1, Art. 15, of our own constitution, adoped in 1850.

Art. 13, Sec. 2, of the Ohio Constitution, provides:

"Corporations may be formed under general laws, but such general laws may from time to time be altered or repealed."

Art 15, of the Michigan Constitution, as it was and remained from 1850 to 1862, reads:

"Corporations may be formed under general laws, but shall not be created by special act except for municipal

purposes. All laws passed pursuant to this section may be altered, amended or repealed."

"The statute of Ohio passed in 1856 authorizes railroad companies of Ohio to consolidate with such companies *of other States.* The 3d section declares that such companies respectively shall be deemed and taken to *be one corporation possessing within the State all the rights, privileges, and franchises,* and subject to all the restrictions, liabilities and duties of said corporation of this State so consolidated. It was provided that the old stock should be extinguished, that a board of directors of the consolidated company should be elected, and that new stock should be created and issued to the parties entitled to it, those refusing to receive it were to be paid the highest market price for their old stock. The 7th section exacts that suits may be brought and maintained against such *new corporation* in the courts of the State in the same manner as against other railroad companies of this State."

Opinion of Sup. Court, 95 U. S., 321-322.

Sections 50, 51 and 52 of the General Railroad Law of Michigan passed in 1855, and still in force in 1869, and which permitted the new company to be organized so far as the lines in Michigan were required or desired, is almost identical with the statute of Ohio of 1856, referred to in the opinion above quoted; there is in fact no difference in the two acts so far as the question at issue is concerned. The States of New York, Pennsylvania and Indiana also passed similar laws.

Now it must be conceded that the Michigan law authorizing or permitting, call it what you will, this new "*corporation,*" the respondent, at least had an equal voice with Ohio in authorizing or permitting the new "corporation" and no more.

The same language in the Ohio Constitution and the General Railroad Law, also found in the Michigan Constitution and General Law, must have the same construction in Michigan as in Ohio. The U. S. Supreme Court having affirmed the Ohio construction.

The Ohio Supreme Court say, referring to this respondent, the L. S. & M. S. Ry.:

"The consolidation took place in 1869 and was effected in all respects pursuant of the act of April 10, 1856, (4 Curwen, 2791; S. & C., 372); and the claim is *that consolidation under that act is to be regarded in law as a surrender or relinquishment of the several individual charters of a company so united, and the acceptance of a charter de novo from the State.* If such be the law, it cannot well be denied that the consolidated company organized, as it was, after the taking

effect of the present constitution, is bound by and subject to all its provisions. Is such the legal effect of the consolidation? Are the old companies dissolved, and their charters extinguished and is the consolidated company a new corporation, receiving all its rights and powers directly from the Legislature?

In the light of the decision by this Court, in the case of the State of Ohio *v.* Sherman *et al.*, (22 Ohio St., 411), we do not see how an affirmative answer to these questions can be avoided. In the case referred to, the Court held, substantially, that a tranfer of all its franchises by a corporation, in pursuance of an act of the Legislature authorizing the same, is in legal effect a grant by the Legislature of similar franchises to the transferee, and constitutes them a new corporation. In that case, it was held, however, that the grant so made did not have the effect to constitute the tranferees a legal corporation, for the reason that their organization was not authorized, or was not effected in a way which made them individually liable as stockholders in the new corporation. No such defect or impediment exists in the present case; and, surely, if a statute of the kind in question in the case referred to, is to be regarded as a statute creating a new corporation, *much more is the statute in question here, the act of 1856, under which the Lake Shore and Michigan Southern Railway Company was organized to be so regarded.* This statute plainly contemplates and expressly provides for the formation of a "new corporation." The old stock is to be surrendered or extinguished; a new amount of capital stock is to be agreed upon and distributed to parties who voluntarily take the same; and a certificate is to be filed with the Secretary of State, which, it is declared, "shall be evidence of the existence of such corporation."

Section 3 of the act declares that the companies thus uniting, "*shall be taken and deemed to be one corporation.*" Section 5 provides for the election of a board of directors of the new corporation, which it denominates "a corporation created by" the consolidation, "and by the provisions of" that act, and vests in "such new corporation" all and singular "the rights, privileges and franchises" of the "*former*" corporation. Nothing could be much plainer, it seems to us, than that a consolidated company, organized under such a statute is a corporation "formed under a general law," within the meaning of Article 13 Sec. 2 of the present constitution, and as such, liable to all the limitations and restrictions therein, equally as corporations organized under the general corporation laws of the State, enacted under the present constitution. The fact that it

is formed out of old defunct corporations does not make it any the less a corporation created by the Legislature. It is not the material out of which it is formed, but the plastic hand which formed it, that we are to look to for its character and status under the constitution.

But it is argued that the consolidated company has the right to fix any rates of fare or passage which it deems proper over the old line of the Junction Railroad, because the original company had that right, and because all its franchises and rights have been transferred to the consolidated company. That argument would have been good before the passage of the act of 1873, or some other act limiting or modifying that right. This right to take unlimited rates of fare, or to take special rates of fare, is no more exempt from legislative control and alteration than it would have been had the company been formed under any other general law enacted since the adoption of the present constitution. All the rights and franchises of a company—this right to make and take rates of fare among the rest—were derived to the company under and by virtue of the act of 1856, and they are all alike subject irrespective of the rights of the old companies, to the legislative power *of alteration, amendment and repeal.*"

Shields *v.* State, *supra.*, pp. 91-3.

See also:

Compton *v.* Railway Company, 45 Ohio St., 592.
Lee *v.* Sturges, etc., 46 Ohio St., 167-169.
Ashley *v.* Ryan, 49 Ohio St., 527-529.

The Shields case is commented upon and approved in these cases.

It is now insisted by counsel that the Court had reference to a consolidation of two Ohio corporations. If the Court will examine the case carefully he will readily see that counsel are mistaken, *entirely mistaken.* There can not be any doubt about what corporation was referred to. The Court named *the Lake Shore & Michigan Southern Railway,* and every line, word and utterance of the Court above quoted had reference to that corporation and *none other.*

And a careful reading of this same case reviewed and affirmed by the U. S. Supreme Court, 95 U. S., 319, shows beyond question that the U. S. Court held the same views as to the result of the consolidation constituting the Lake Shore & Michigan Southern Railway. And distinctly held, that so far as to the line in Ohio and all the line within

the State the right of the Legislature to change and reduce the rate of fare is fixed by the statute of 1856, (4 Curwin, 2791, S. & C., 327,) and by the Company in Ohio accepting its provisions and consolidating with the other companies *outside of the State.*

It also holds that the subsequent act of 1873 reducing the rate applied to this Company as to its line in Ohio.

So here, we insist, that in Michigan, the "new corporation," The Lake Shore & Michigan Southern Railway Company, took all the rights, privileges and favors transferred to it at the time of the consolidation, and accepted them, as to the line in Michigan, *subject to future legislation in this State.*

That Act 202 of the laws of 1889 changed the rate of fare, and the old right to charge three cents per mile was changed.

That the same section re-enacted in 1891 is now the law of this State, and applies to all the lines in this State "*operated*" by respondent.

The United States Supreme Court say in the case of

Shields *v.* Ohio, *supra*, p. 324.

"It is urged that the franchise here in question was property held by a *vested* right, and that its sanctity, as such, could not be invaded. The answer is *consensus facit jus.* It was according to the agreement of the parties. The Company took the franchise subject expressly to the power of alteration or repeal by the General Assembly. There is therefore no ground for just complaint against the State."

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It is insisted by the learned counsel, Mr. Pond, in his brief in Michigan Supreme Court that the old Michigan Southern & Northern Indiana Railroad Company was not a *new corporation;* and he also insists that the respondent, the Lake Shore & Michigan Southern Railroad Company, is not a *new corporation.*

He says on page 68 of printed brief:

"Now it is too clear for argument that the Legislature, by the passage of the act of 1855, authorizing the consolidation of the Michigan Southern Company with the Northern Indiana Company, did not intend that by acting under it the said Michigan Southern Company should surrender its charter. It could not have so intended; because the result would have been the creation of a corporation by a special act, which was forbidden by the constitution."

The special act referred to was approved February 13, 1855. The general law for the incorporation of railroad companies was approved February 12, 1855.

The things necessary to be done in order to effect a new corporation of the consolidated companies, are practically the same in the special act that they are under the general law.

What the purpose or necessity of this special act was, it is difficult to understand, because the general law fully authorized the Michigan Southern and Northern Indiana Railway Company to consolidate, and do just what they afterwards did. The fact that such a corporation is forbidden by the constitution to be created by a special act, cuts no figure.

It is entirely plain that the Legislature intended to create or authorize the creation of "*a new corporation.*"

It provides, Section 1, that said union shall "become *one corporation.*"

Section 3 provides "the said *corporation*, so to be organized by virtue of this act. * * "

Section 5 provides "the said *new corporation, so to be formed by such consolidation.* * * "

And in every place where the new body is mentioned or referred to in the act itself, it is called a "new corporation."

As to whether, during the life of this "new corporation," it actually operated by virtue of the special act or the general act which was passed at the same time, we do not know, as the general act fully authorized said corporation to act as it did act, and to unite as it did unite, and even if the special act was unconstitutional, the general act would save the "new corporation" from falling.

Mr. Pond further claims, on pages 68 and 69 of printed brief, that under the general law of 1855, the section authorizing the transfer of the rights and privileges, etc., of the Michigan Southern & Northern Indiana Railroad Company, included the right to continue to charge three cents per mile by the Lake Shore & Michigan Southern Railroad Company.

He says:

"Now, it is entirely clear that the right of the Michigan Southern Company to charge for the transportation of passengers not to exceed three cents per mile, was a *right* or *franchise* within the meaning of this provision."

If the learned counsel had carefully examined the opinion in St. L. & San Francisco Ry. Co. *v.* Gill, *supra.*, where this very question was directly passed upon, he would have seen that his contention is not the law.

As we have already said, that case expressly holds that

such immunities as taxation and the *right to determine and fix rates of fare*, are not included in the common terms "franchise, rights, etc.," unless specifically mentioned.

The case just cited, and also the case of Attorney General *v.* Boston & Albany Ry. Co., *supra.*, as well as the Shields case, all hold that the new entity, formed as respondent was formed, of corporations of different States, does constitute a new corporation.

On page 82 of the Massachusetts case, Justice Fields says:

"The Old Colony Railway Company *is a corporation* in this commonwealth and in the State of Rhode Island, *formed by the union* of various railroad companies chartered by this commonwealth or by the State of Rhode Island."

The petition in this case alleges:

Par. 1. "That the Lake Shore & Mich. Southern Railroad Company is and was on, to-wit: the 19th day of April, last, and for a long time prior thereto, had been a private corporation organized and doing business under the laws of the State of Michigan, partly in this State and partly in the States of New York, Ohio, Indiana and Illinois, and as such, operated a railroad in said States except in the Upper Peninsula of the State of Michigan, for the transportation and carriage of persons and freight."

*Paragraph 1 of the answer*, page 9 of Record, alleges:

"That this respondent, the Lake Shore & Michigan Southern Railway Company, *is a railroad corporation*, owning and operating a railroad between Chicago, in the State of Illinois, and Buffalo, in the State of New York, which passes through and into the States of Illinois, Indiana, Ohio, Pennsylvania and New York. * * * * *."

If the learned counsel, Mr. Pond, had read the answer filed in this case before preparing his brief, he must certainly have forgotten that it was admitted in the answer that the respondent "is a corporation."

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We have not overlooked the two tax cases in this State, reported in 46 Mich., 224, and 53 Mich., 79, and we think we fully appreciate the force and weight of the language of Mr. Justice Cooley, quoted by counsel on page 47, printed brief, filed in the Michigan Supreme Court.

It must be conceded, however, that this language of the learned Justice was a mere *dictum*, that it was not necessary to the decision of the case before the Court, nor was such declared to be the law. The only question decided in that case and held to be the law is the following paragraph:

"It follows that the Michigan corporation which has been consolidated with the complainant, is alone of the consolidated organizations to be considered a company *formed under the laws of Michigan*, and it should have been taxed on the basis on which it was taxed from 1873 to 1878."

Mr. Justice Cooley in his reasoning also uses the following language:

"When, therefore, two corporations created in different States consolidate, *though for most purposes they are not thereafter to be separately regarded*, yet in each State the consolidated company is deemed to stand *in the place of the corporation to which it there succeeded.* * * While in the other State it would stand *in the place* of the other corporation. * * * ."

This language plainly indicates that even in the mind of Judge Cooley, the new entity is a "new corporation," and *succeeded* in each State to the *former corporation* existing in such State.

So we submit that the question decided by the Court was not only not the question as to whether the new entity is *a corporation*, but that the reasoning of Judge Cooley when all read together is entirely consistent with our contention that the respondent is *a corporation.*

For the purposes of this case it is not necessary that such corporation should have been formed exclusively under the general laws of Michigan.

The 1891 act simply provides:

"That One Thousand Mile Tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State, *or carrying on business partly within and partly without the limits of this State, at a price not exceeding Twenty Dollars in the Lower Peninsula and Twenty-five Dollars in the Upper Peninsula.*"

This language would apply to respondent, if it is "a railroad company," carrying on business partly within and partly without the limits of this State, whether organized exclusively under the laws of Michigan, or under the laws of Michigan and the several other States through which it passes.

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In this connection we again call the Court's attention to the Wellman case, reported in the 83d Michigan, and to the holding of that Court, that this law, the 1891 act, was intended to apply only to railroad companies *operting* railroads in this State, regardless of the question as to how

such railroads were formed; that it was not intended to apply to old companies out of which consolidated railroad companies were formed, but to the new consolidated company *operating railroads and engaged in the business of carrying passengers.*

It is conceded in the answer of respondent that the respondent now owns and operates the old line of road, "formerly owned by said Michigan Southern Railway Company, and the ticket office mentioned in said petition was and is the ticket office of said respondent upon said road, so, as aforesaid, heretofore owned by the Michigan Southern Railroad Company."

Page 11 of Record.

Respondent further admits:

"Said Michigan Southern Railway Company has had no directors or officers, nor separate stockholders, since the consolidation of the Michigan Southern Railway Company."

See Return, par. 8, p. 17, Record.

These concessions certainly show that the old Michigan Southern Railway Company is not now operating the old road, or any part of it, or anything else.

More than that, it concedes that the old Michigan Southern Railway Company is either extinct, or at least dormant, and has been for many years. For all practical purposes it is not only dead but should be forgotten. The ghost should be bidden to avaunt, and trouble us no more.

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We now refer to the cases cited by the learned counsel for respondent in his brief in the Michigan Supreme Court more at length, to point out wherein they are distingnishable from this case.

In Tomlinson *v.* Branch, 82 U. S., and
Central Railroad, etc., *v.* Georgia, 92 U. S.,

cited by counsel. The consolidation in each case was under special act.

And in each case, *one company was merged into the other company.*

In the Tomlinson *v.* Branch case the act provides:

"That whenever the written consent of all the stockholders of the South Carolina Canal & Railroad Company shall have been obtained, *the said South Carolina Canal & Railroad Company shall be merged in the said South Carolina Railroad Company,* and thereupon and thereafter all the

rights, privileges and property belonging to said South Carolina Canal & Railroad Company shall be vested in the said South Carolina Railroad Company * * * *."

A careful examination of this case will show that the Court held, that the South Carolina Railroad Company, into which the other company was merged, remained intact just as before.

Such ruling was simply a statement of the facts, and is good sense.

But the Court also held as to the other company, the one that was swallowed, that its

"Corporate rights and franchise * * which appertain to its existence and functions as a corporation * * became *merged and extinct*."

The case of

Central Railroad Co. *v.* Georgia, 92 U. S., 665.

cited by Mr. Pond, was decided on a similar state of facts.

In this case one railroad was merged into the other.

The Macon & Western Railroad Company was merged "under the *name and charter* of the said The Central Railroad & Banking Company of Georgia."

The act also provided that all outstanding "contracts shall be assumed by, and be binding on the Central Railroad & Banking Company of Georgia, and all benefits and rights under the same shall accrue to and vest in the said last mentioned company."

In the opinion, the Court says:

"Nowhere in the act is there an intimation of any legislative purpose that the Central Railroad Company should cease to exist.

The Macon & Western Railroad was undoubtedly intended to go out of existence; for provision was made for the surrender of all the shares of its capital stock: *and without stockholders it could not exist*."

Following these cases is

Railroad Company *v.* Georgia, 98 U. S., 359.

Here was a plain case of consolidation; no merger one into the other, but both *merged into a new company*, then and there, and *thereby* created and organized *de novo*, out of the old companies.

The Court says:

"It is conceded that under this act a consolidation took

place. It is, therefore, a vital question. What was its effect? Did the consolidated companies become a new corporation, holding its powers and privileges as such under the act of 1863? Or was the consolidation a mere alliance between two pre-existing corporations, in which each preserved its identity and distinctive existence? Or, still further, was it an absorption of one by the other, whereby the former was dissolved, while the latter continued to exist. The answer to these inquiries must be found *in the intention of the Legislature as expressed in the consolidating act.* We think that intention was a creation of a new corporation out of the stockholders of the two previously existing companies. The consolidation provided for was clearly not a merger of one into the other, as was the case of Central Railroad & Banking Company *v.* Georgia, 92 U. S., 665. Nor was it a mere alliance or confederation of the two. If it had been each would have preserved its separate existence, as well as its corporate name. But the act authorized the consolidation of the stocks of the two companies, thus making one capital in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company; *and, if so, how could either have a continued separate being?*"

The Court further says:

"Looking thus at the legislative intent appearing in the consolidation act, we are constrained to the conclusion that a new corporation was created by the consolidation effected thereunder, in the place and in lieu of the two companies previously existing, and that whatever franchises, immunities or privileges it possesses, it holds them *solely by virtue of the grant that act made.*" That generally the effect of consolidation, as distinguished from a union by merger *of one company into another*, is to work a *dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result.*"

The Court again says:

"When, as in this case, the stock of two companies is consolidated, the stockholders become partners, or *quasi* partners, in a new concern. Each set of stockholders is shorn of the power which, as a body, it had before. Its action is controlled by a power outside of itself. To illustrate: The stockholders of the Savanah & Albany Railroad Company could not, after consolidation, have exercised any of the powers or franchises they had prior to their consolidation with the stockholders of the Atlantic & Gulf Railroad Company. They could not have built their road

or controlled its management. They could not, therefore, have performed the duties which by their original charter were imposed upon them. Those duties could only have been performed by another organization, composed partially of themselves and partially of others. Their powers, their franchises, and their privileges were therefore gone, no longer capable of exercise or enjoyment. Gone where? Into the new organization, the consolidated company, *which exists alone by virtue of the legislative grant, and which has all its powers, facilities, and privileges by virtue of the consolidation act.* What then was left of the old companies? Apparently nothing. They must have passed out of existence, and the new company must have succeeded to their rights and duties. *But the new company comes into existence under a fresh grant.* Not only its being, but its powers, its franchises, and immunities, *are grants of the Legislature which gave it its existence.*"

The General Law of 1855, Section 51, provides:

"Upon making the agreement mentioned in the preceeding section, in the manner required therein, and filing a duplicate or counterpart thereof in the office of the Secretary of State, the said two or more corporations mentioned or referred to in the said section, *shall be merged in the new corporation provided for in such agreement*, to be known by the corporate name therein mentioned * * * "

The word "merged" means more than merely "united," "combined," or "joined" together.

Webster defines: "Merged—To be sunken, swallowed up, or lost."

Hence the meaning of the above statute is:

The Michigan corporations entering into such agreement shall be "sunken," swallowed up, or lost, in *the new corporation provided for, etc.*

So we say, that so far as we have been able to examine the several cases cited by counsel, and the several acts authorizing the "*union*" into the new body, the turning point has always been as to whether there was a mere alliance or *joining* of the two or more corporations, or whether the act provided for a *new corporation* and a *merger* of each of the old *into the new.*

The learned counsel, Mr. Pond, p. 44 of his brief in Michigan Supreme Court, says:

"Questions as to the effect of the consolidation of two such corporations have in several instances been before the courts, with the result of decisions which seem to me not quite consistent, but it is unnecessary to attempt to reconcile such cases here."

It seems to us the inconsistancy mentioned by the learned counsel is not as real as he imagines.

We submit that Mr. Justice Strong, who wrote the opinion in the case reported in 92 U. S., *supra*, and also in 98 U. S., *supra*, clearly draws the distinction, and clearly shows that where the statute merely provided for an *alliance*, or *joinder*, or *union*, of two or more bodies, that the old corporations do not necessarily lose their identity, do not necessarily relinquish the old charter. But, that, when the statute provides for a *merger*, that the old company that is *merged*, whether only one, or all of the former companies, loses its existence, and becomes extinct.

The case of Nashua Railroad *v.* Lowell Railroad, 136 U. S., cited by counsel.

In that case there was no merger of either company, neither the statute of Massachusetts, nor that of New Hampshire provided for a merger. The acts of the two States provided only for a *joinder* or *union* of the two old companies.

The Court, in that case, expressly hold, that there is nothing in the law of either State, from which any inference can be drawn, that it was the intention of either Legislature, that the old company should be merged and become extinct.

On the other hand the 1855 statute provides that every Michigan corporation which unites with another corporation, whether within or without this State, "*shall be merged in the new corporation provided for in such agreement.*"

So we insist that it is clear that the old Michigan Company entering into the agreement provided for, became merged, and was "swallowed up or lost" in the new company.

It is also plain that the subsequent conduct of all the parties has been upon that theory.

As was conceded by counsel upon the hearing below.

"Said Michigan Southern Railway has had no separate directors nor officers *nor stockholders* since the consolidation, etc. * * ."

See par. 8 of Return.

And as Mr. Justice Strong well said in Central Railroad *v.* Georgia, 92d U. S., p. 472, *supra:*

"Without stockholders it cannot exist."

It seems to be conceded by the learned counsel, Mr. Pond, that when two domestic corporations, located in the same State, are consolidated into one body, that it is a question of legislative intent, to be drawn exclusively from the terms of the act authorizing the consolidation, as to whether the new body constitutes a *new corporation*, or

whether it is a mere union of former corporations, leaving each of the former corporations as separate and continuing corporations.

Does it not follow that the same rule will apply in case of corporations of different States consolidating?

Is there any reason for a different rule, except that neither State can have any control or power over any of the consolidating companies, except those within its own territorial limits?

If, however, each of the several States pass a law empowering its own domestic corporation to enter into the combination, and the several corporations of the said several States enter into an agreement to form a *new corporation*, under the respective acts of their several respective States, how can any of the parties to the compact thus made, be afterwards heard to say that the new body is not a corporation, or that the old company was not *merged, if the statute of its own State so provides?*

The case of

St. Louis, etc., Ry. *v.* Berry, 113 U. S., 465,

was a consolidation of certain Missouri corporations with certain other Arkansas corporations.

The new body was held to be a *new corporation.*

That the old corporations *became merged and extinct.*

That the special exemptions and immunities belonging to the old companies did not appertain to the new.

Wabash & Pac. Railway Co. *v.* Ham, 114 U. S., 545.

This was a case where certain Ohio, Indiana, and Illinois corporations had been consolidated.

We quote from the opinion:

"Whether the old corporations are dissolved into the new corporation, or are continued in existence under a new name and with new powers, * * * depends upon the terms of the agreement of consolidation, and of the statutes under whose authority that consolidation is effected.

In the present case * * * the consolidation was made under and pursuant to statutes of Ohio, Indiana, and Illinois * * * ."

The effect of the Ohio consolidation act was to *merge the old corporation into the new one*, which took their place, succeeded to their property, and assumed their liabilities. Sheilds *v.* Ohio, 95 U. S., 319; Railway *v.* Georgia, 98 U. S., 359."

The learned counsel for respondent will hardly claim that Mr. Justice Gray, who wrote this opinion, was referring to *two domestic corporations in Ohio.*

We submit there can be no reason why each State authorizing corporations within its own jurisdiction to consolidate with corporations of other States, may not by the terms of the act granting the authority, fix the status, both of the old organization, as well as the new that takes its place, *within the limits of its own territory and jurisdiction.*

See Muller *v.* Dow, 94 U. S., 447.

And when the express terms of the act provide that the consolidated company shall be a *new corporation within such State*, and that the old corporation "*shall be merged in the new corporation provided for in such agreement*," as the 1855 act provides, there can be no doubt that the old company and its old charter become extinct—dissolved—and voluntarily surrendered, and no authority has been cited to the contrary.

The case of

People *v.* N. Y. C., etc., Ry., 129 N. Y., 474,

cited by the learned counsel, Mr. Pond, is not opposed to our contention.

We quote from the opinion:

"The consolidation act of 1869, it is true, assumes, upon the consolidation, not only of domestic corporations, but of corporations of different States, to transfer to and invest in the consolidated company formed under its provisions all the "rights, privileges, exemptions and franchises and property," *of each of the constituent companies.* But the Legislature of this State was impotent alone to accomplish this result. It could not vest the franchises, rights and property of the Pennsylvania, Ohio and Indiana companies in the consolidated company, nor authorize any change or conversion of the stock of the constituent corporations into the stock of the consolidated company, nor confer any exclusive authority for their consolidation. All it had the power to do, and all that the act of 1869, in effect, did do, was to authorize the New York corporation, upon like consent being given by Pennsylvania, Ohio and Indiana, to merge the franchises, property and interests of the several constituents into what would practically be one corporation. When this was sanctioned by the Legislatures of the respective States, and the proper formal proceedings were taken, then, and not till then, could a new body be created.

Whether the result would be a new corporation *de jure*, is a mooted question. (See Muller *v.* Daws, 94 U. S., 444; Shields *v.* Ohio, 95 *id*, 319; St. L., I. M. & S. R. Co. *v.* Berry, 113 *id*, 465; Nashua R. R. *v.* Boston, etc., R. R., 136 *id*, 356.)

But assuming the result to follow, the new corporation would owe its existence not to the State of New York alone, but to the States of New York, Pennsylvania, Ohio and Indiana. It would not be in any strict or even just sense a corporation incorporated under any general or special law of this State * * .

*The consolidation act does, indeed, confer new corporate powers upon the New York corporation. Except for that act it could not have entered into the agreement of consolidation.* * * * ."

So we say that the Michigan corporation, entering into the consolidated company, was *merged in the new*.

That its successor in Michigan is a *new corporation*.

That such new corporation in Michigan obtained its existence and franchises and rights solely by virtue of the 1855 law, and is subject to all its provisions.

The original charter of the Michigan Southern Railway Company, Section 37, found in Section 548, page 236, Railway Laws of Michigan of 1896, is as follows: "The State reserves the right at any time after thirty years from the passage of this act, by a vote of two-thirds of each branch of the Legislature, to alter, amend or repeal the same; provided the said company shall be compensated by the State for any damages sustained by reason of such alteration, amendment or repeal."

The thirty years had expired before the passage of the act under which these proceedings are instituted. The presumption will be that the act was passed by two-thirds of the members of each branch, that it was passed legally.

It is also true, as we have before shown, that if the company should ask for any damages, the State would pay them, for, it must be presumed, it would pay its honest debts.

It is provided in Section 16 of the Erie & Kalamazoo Railway Company's charter, found in Section 591, page 254, Railway Laws of Michigan of 1896, as follows: "That the said President and Directors * * * shall have power to charge for tolls and transportation such sums as shall be established by the by-laws of the company * * * * ."

It is also provided in Section 11 of the charter of the Michigan Southern Railway, found now in Section 522, page 229, Railway Laws of Michigan of 1896, "That the said company shall have power * * * to charge for tolls and transportation such sums as shall be lawfully

established by the by-laws of said company, not exceeding, etc."

The State also reserved the right to alter, amend, or repeal the charter at any time after thirty years by a vote of two-thirds of each branch of the Legislature.

Section 9, Act 1850, found in Section 568, page 245, Railway Laws of Michigan, 1896.

Now, it is common knowledge, and it is also admitted in these proceedings, because it is stated in the petition and not denied in the answer, that respondent, for many years prior to the filing of relator's petition, had for sale and sold one thousand mile tickets at two cents per mile over the various lines of its railroad. And we submit that it is a fair inference that this rate had been established by the by-laws of the company as the rate for this kind of a ticket.

I also call attention to the decision in the Michigan Supreme Court. Judge Grant and Judge Hooker each filed dissenting opinions, but did not contest the point that the charter of respondent has expired, but rather conceded this.

In addition to the foregoing argument, I also beg leave to present and file the original and also the supplemental brief made and filed by my partner, Judge Richard A. Watts, in the Michigan Supreme Court, in which the points above discussed by me, and the other points in the case, are more ably and fully discussed, and I trust the Court will give the argument of Judge Watts, upon all of the points in the case, due consideration.

Respectfully submitted,

HENRY C. SMITH,

In *pro per.*

No. 227.
App.t to Br. of Smith for D. C.
Filed Mar. 14, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.

*No. 227.*

THE LAKE SHORE AND MICHIGAN R. R. CO.,
PLAINTIFF IN ERROR,

*vs.*

HENRY C. SMITH.

## APPENDIX TO BRIEF OF HENRY C. SMITH.

We print parts of the acts of the legislatures of Indiana and Michigan, in addition to what is printed by Mr. Greene in his brief. Also the articles of consolidation filed with the secretary of state of the State of Michigan. Also the determination of the last board of control of internal improvements of the State of Michigan which fixed the rates of toll for the Southern Michigan road which were in effect January 1, 1846, viz:

### An act to incorporate the Indiana Railroad Company, passed by the General Assembly of the State of Ohio March 3, 1851.

SEC. 2. That the capital stock of said company shall consist of five hundred thousand dollars in shares of one hundred dollars each with the privilege of increasing

the same to any amount, not exceeding one million dollars, and shall have power to construct a railroad from the city of Toledo by the most direct and practicable route, to the State line of Indiana and in the county of Williams and at such point as the Buffalo and Mississippi railroad of the State of Indiana may connect therewith, or such other road as may be incorporated by said State to connect with and to form a continuous line from the State line of Illinois, near Chicago to Toledo in this State, and also to construct a railroad from the city of Toledo northward in the direction of Monroe to connect with any railroad running from the direction of Detroit to the city of Toledo.

SEC. 5. That said company shall be, and is hereby, authorized to connect by contract with any other railroad company formed or hereafter formed or incorporated in the States of Indiana or Michigan and consolidate its capital stock and any part thereof with the capital stock of such company or companies in the States of Indiana or Michigan; and to have and use the style and name of any such company or of such other name as they may mutually agree upon, and shall constitute part of such company thus consolidating and in case of such consolidation, to have a uniform width of track with the railroad thus connected with.

**An act to authorize railroad companies to consolidate their stock with stock of railroad companies in this or any adjoining State, and to connect their roads with the roads of said companies, and to authorize railroad companies to construct their roads on the routes which they may have heretofore surveyed and located, and to use and occupy the same when completed.**

SEC. 1. *Be it enacted by the General Assembly of the State of Indiana,* That any railroad company heretofore organized under the general or special laws of the State, shall have the power to intersect, join and unite their railroad with any other railroad constructed or in process of construction in this State or in any adjoining State at such point on the State line or at any other point as may be mutually agreed upon by said companies. And such railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint stock company of the two railroads thus connected, upon such terms as may be by them naturally agreed upon, in accordance with the laws of the adjoining State with whose road or roads connections are thus formed: *Provided,* Their charters authorize said railroad to go to the State line, or to such point of intersection. (Approved February 23, 1853.)

We print the remainder of section 5 of "An act to authorize the sale of the Southern railroad, and to incorporate the Michigan Southern railroad," as follows:

"And no railroad or railroads from the eastern or southern boundary of the State shall hereafter be authorized to be built or constructed by or under any law of this State, any portion of which shall approach westwardly of the township of Monroe, in the county of Monroe, within five miles of the line of said railroad, as designated in this act; nor shall any railroad or railroads be so authorized to be built or constructed which shall commence within twenty miles

of the city of Monroe, and extend to Lake Michigan, or the southern boundary line of the State, and the line of which shall, on an average, run within twenty miles of the main line of the said Michigan Southern railroad."

This was repealed by the act of 1883, referred to in Mr. Greene's brief.

We also print section 19 of said original charter, as follows:

"SEC. 19. From the time when the franchises granted by this act shall vest in said Michigan Southern Railroad Company, said company thenceforward and ever afterward, (save on the first day of the week, or in case of accident, which shall prevent,) shall keep open for public use, and in good repair, and with sufficient motive power and cars for the transportation of persons and property, under such by-laws as said company may lawfully make, so much of their railroad in this act mentioned and described as shall extend from the city of Monroe to the village of Hillsdale; and the said railroad between the city of Monroe and Adrian shall at all times be kept in all respects in as good condition and repair as the road between Adrian and Hillsdale; and the motive power and cars of all descriptions shall at all times, on that portion of the road between Monroe and Adrian, be in no respect inferior either in quality or quantity to those on that part of the road west of Adrian; and whenever the said company shall put a T rail or other heavier iron rail than is now laid on said road, or any portion of the line of said road, the said company shall first relay the track between Monroe and Adrian, and place such heavier iron on said track between Monroe and Adrian before such heavier iron shall be placed on the road between Adrian and Hillsdale."

Also section 28, as follows:

"SEC. 28. The said directors, or a majority of them, shall have power to appoint, contract with and determine the compensation of all such officers, engineers, agents and servants whomsoever, as they may deem necessary for the transaction of the business of the company, and remove them at pleasure, and the said directors, or a majority of them, shall have power to determine the manner and evidence of the transfers of the stock in said company, and they shall have power to pass all by-laws which may be necessary for the carrying into execution all the powers vested in the company hereby incorporated: *Provided*, Such by-laws shall not be contrary to the Constitution or laws of the United States, or of this State.

"SEC. 29. The directors shall have full power to conduct the affairs of said company, and to exercise any powers which said company might exercise, except where provision is made by this act for the exercise of such powers by the stockholders at their annual or special meetings, or where the powers of the directors may be restrained by the by-laws of said company (approved May 9, 1846)." March 28, 1850, the original act was amended.

We print section 8 as follows:

"The tariff or rates of toll and passage for the transportation of persons and property on or over that portion of said Southern railroad between the city of Monroe and the village of Adrian, shall never exceed the lowest price at any time charged from the village of Adrian to Toledo, on the railroad between the two last-named places, nor the price at any time to be charged on any railroad leading from any part of the county of Lenawee, directly or indirectly, to any point within the State of Ohio, while or whenever there may be any connection of the Michigan Southern railroad with any other railroad leading into the State of Ohio."

We print section 49 as follows:

"Any railroad company in this State may, by means of subscription to the capital of any other company, or otherwise, aid such company in the construction of its railroad, with the assent of such other company; or any railroad company, in order to facilitate the transaction of business, and prevent the expense to the public of delays, stoppages and unnecessary transhipment of merchandise and passengers, may make any arrangements with other railroad companies within or without this State, for the running of its cars over the road of such other company, or for the working and operating of such other railroads as said companies shall mutually agree upon.

"SEC. 50. Any railroad company in this State, forming a continuous or connected line with any other railroad company, may consolidate with such other company either in or out of this State, into a single corporation.

"SEC. 51. Upon making the agreement mentioned in the preceding section, in the manner required therein, and filing a duplicate or counterpart thereof in the office of the secretary of state, the said two or more corporations mentioned or referred to in the said section, shall be merged in the new corporation provided for in such agreement, to be known by the corporate name therein mentioned, and the details of such agreement, to be known by the corporate name therein mentioned, and the details of such agreement shall be carried into effect as provided therein.

"SEC. 52. Upon the election of the first board of directors of the corporation created by said agreement, all and singular the rights and franchises of each and all of said two or more corporations, parties to such agreement, all and singular their rights and interests in and to every species of property and things in action, shall be deemed to be transferred to and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with all the right of way and all other

rights of property, in the same manner and to the same intent as if the said two or more corporations, parties to such agreement, should have continued to retain the title and transact the business of such corporations.

"SEC. 63. All acts the subjects of which are herein reenacted, or which contravene or are inconsistent with the terms and intention of this act, are hereby repealed."

## Articles of Consolidation.

AN AGREEMENT BETWEEN THE MICHIGAN SOUTHERN RAILROAD COMPANY AND THE NORTHERN INDIANA RAILROAD COMPANY, CONSTITUTING THE MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD COMPANY.

Articles of consolidation and agreement, made and entered into the twenty-fifth day of April, one thousand eight hundred and fifty-five, by and between The Michigan Southern Railroad Company, of the first part, and The Northern Indiana Railroad Company, of the second part.

Whereas the said parties of the first part are a railroad company, organized under and by virtue of the laws of the State of Michigan, by a charter and amendments thereto, authorizing the same to construct the railroad and branches in the State of Michigan, in said charter and amendments mentioned:

And whereas the said parties of the second part are another railroad company organized under and by virtue of the laws of the States of Indiana, Ohio and Illinois, authorizing the said parties of the second part to construct railroads, as mentioned in their acts of incorporation:

And whereas the said railroad of the said parties of the first part meets and intersects the railroad of the said parties of the second part, at a point in the boundary line between the States of Michigan and Indiana, and forms therewith a

continuous line of railroads, extending from the city of Chicago to the head of Lake Erie, at Monroe, and also making connection through Ohio, to Toledo, in the State of Ohio:

And whereas the said parties of the first and second parts have intersected, connected, joined and united their railroads by mutûal agreement:

And whereas the charters of the said parties of the first and second parts authorize their said railroads to go to the said State line of the States of Indiana and Michigan, at the said point of intersection:

And whereas the said parties of the first and second parts have mutually agreed to consolidate their respective capitals with each other, and to merge and consolidate the stock of their respective companies, and make one joint stock company of their two railroads, and to consolidate the property and stock of the said parties of the first and second part, and their respective companies upon the terms and conditions hereinafter stated and declared:

And whereas the said parties of the first and second parts are duly authorized by law to consolidate in the manner hereinafter provided:

And whereas the terms of consolidation between the said parties of the first and second parts, hereinafter contained, have been fixed and regulated by the by-laws of the said respective companies, and these present articles are framed and executed in pursuance of such by-laws:

And whereas a majority in interest of the stockholders of each of the said corporations, parties of the first and second parts, at meetings called for that purpose, have passed a vote to consolidate the said two companies:

Now these presents witness, that the said parties of the first and second parts, in consideration of the mutual execution of these presents, do hereby merge and consolidate the stock of their respective companies, and make one joint stock company of their respective railroads, and do hereby

consolidate their respective stock and property, and also their respective companies with each other, and do hereby unite their said two respective corporations, and constitute them into one corporation, to be called "The Michigan Southern and Northern Indiana Railroad Company;" and the said parties of the first and second parts, for the consideration aforesaid, do mutually agree and declare that the name of the said consolidated company, by these presents formed, is and shall be "The Michigan Southern and Northern Indiana Railroad Company," by which name the same shall be a body corporate and politic, and shall have a common seal, and by which name the same shall contract and be contracted with, sue and be sued, implead and be impleaded with, and have all the powers, franchises, immunities, property and privileges now enjoyed by the said parties of the first part, or the said parties of the second part, or which either of the said respective companies of the said first and second parts have or had by virtue of their respective charters before the execution of these presents. And the said parties of the first and second parts, for the consideration aforesaid, do hereby mutually and respectively grant, bargain, sell, release, convey, assign, transfer and set over, unto the said consolidated company, "The Michigan Southern and Northern Indiana Railroad Company," all and singular their several and respective railroads, railroad lands, stations, cars, locomotives, furniture, tools, machinery, fuel, timber, iron, stone and other materials, and all their several and respective bonds, bills, notes, demands, moneys and things in action, and all and singular their several and respective estates, property and effects, real and personal, at law and in equity, wheresoever situated and howsoever held; and all and singular their several and respective franchises, privileges and immunities, and do declare the same henceforth to be the estates, property and effects, fran-

chises, privileges and immunities of the said consolidated company, to all intents and purposes.

And the said parties of the first and second parts, for the consideration aforesaid, do hereby mutually and respectively agree, that all and singular the debts, liabilities and obligations whatsoever of the said parties of the first and second parts severally and respectively, shall be henceforth the proper debts, liabilities and obligations of the said consolidated company, to all intents and purposes.

And the said parties of the first and second parts, for the consideration aforesaid, do mutually agree and declare that the said consolidation shall take effect, and the said consolidated company shall go into operation immediately on the due execution of these present articles, and that the board of directors of the said consolidated company shall carry said consolidation into effect by all necessary acts and things for that purpose.

That the number of directors of the said consolidated company shall be thirteen; that the names of the first directors of said united corporations are John B. Jervis, Edwin C. Litchfield, Charles Butler, John Stryker, Elisha C. Litchfield, Hugh White, John S. Barry, Ezekiel Morrison, John Wilkinson, Thomas Barron, Daniel B. St. John, Hamilton White and Edwin D. Morgan, who shall constitute the board of directors of the said consolidated company, until the first election of directors thereof shall be held. That said board of directors shall meet at Laporte, in the State of Indiana, on the twenty-sixth day of April, one thousand eight hundred and fifty-five, at two o'clock p. m., for organization and the transaction of business; that the first election of directors of said consolidated company shall be held at Adrian, in the State of Michigan, at ten o'clock in the forenoon, on the fourth Wednesday in April, one thousand eight hundred and fifty-five; that the annual election of directors of said consolidated company shall be held on the fourth Wednesday of

April in each year, after the said first election; that the amount of capital of the said consolidated company shall be twelve millions of dollars, and the same shall be divided into one hundred and twenty thousand shares, of one hundred dollars each; that the stockholders of the said companies of the said parties of the first and second parts shall be and continue stockholders of the said consolidated company, in the same respective number of shares, and of the like respective kinds of stock, and upon the like terms and conditions respectively as they now are stockholders in either of the said present companies of the parties of the first and second parts, and that the stockholders of the said present companies of the said parties of the first and second parts shall have power to surrender their shares of stock in either of the present companies of the parties of the first and second parts, to the said consolidated company; and upon every such surrender, stock of the said consolidated company, in equal number and amount of shares and with the like conditions and stipulations, shall be issued to the stockholders respectively making such surrender, and such surrender may be made by returning the certificates of the stock so surrendered to the office of said consolidated company, to be cancelled, and that the stockholders of the said consolidated company shall have all the rights and privileges as stockholders in the said consolidated company which they now have as stockholders in the present company whereof they now are stockholders; and that all the books of account, stock transfer books, notes and obligations for the payment of money, certificates of stock and powers to transfer or to vote upon stock in either of said companies, shall be deemed and taken to be books of account, stock transfer books, notes and obligations, certificates and powers to transfer and vote in said consolidated company, and may be, by said consolidated company, used, issued and reissued, and shall be in all respects recognized

and sanctioned as legal and valid to the same extent and in like manner as they would have been legal and valid in either of said original companies, until otherwise ordered by the board of directors of said consolidated company, and the officers and agents of the company of the parties of the first part shall be the officers and agents of said consolidated company until others are appointed in their places by the board of directors of said consolidated company or by its authority; and that until the board of directors shall make or procure a common seal for the said consolidated company, the present corporate seal of the said parties of the first part shall be the common seal of the said consolidated company; and that the elections of directors of the said consolidated company shall be held under the direction of three stockholders thereof, not being directors at the time, appointed by the board of directors at a meeting previous, or chosen by the stockholders present at the election; that notice of the time and place of the election shall be given by advertisement; that in case an election shall not be held on the day appointed for the same, or shall otherwise fail of being an effectual election, the board of directors may cause such election to be held on another day, by them appointed, and upon like notice; and that all the rights, privileges and immunities, as well of the said parties of the first part as of the said parties of the second part heretofore vested in or exercised by their respective boards of directors or their respective officers, shall be henceforth vested in and exercised by the board of directors or officers of the said consolidated company respectively; for the benefit of the said consolidated company, and that all the deeds, bonds, contracts and other acts and writings of either the said parties of the first part or of the said parties of the second part, shall be and continue the proper deeds, bonds, contracts and other acts and writings respectively of the said consolidated company, without any surrender or change thereof; and that all future subscrip-

tions to the capital stock shall be made, and all issues of new stock upon such subscriptions shall be made as shall be directed by the said board of directors of the said consolidated company.

In witness whereof, the said parties of the first and second parts have caused these presents to be made and executed under their respective common seals, and to be evidenced as well by the signature of the president as by the corporate seal of each of the said companies of the said parties of the first and second parts, the day and year first above written.

JOHN B. JERVIS, *President.* [L. S.]
JOHN B. JERVIS, *President.* [L. S.]

Sealed and delivered in presence of—
ELISHA C. LITCHFIELD,
*Secretary pro Tem.*

## Report of Improvement Board.

* * * * *

The last board, which is known as the sixth board of control of internal improvements, passed a resolution on August 18, 1843, fixing a table of rates as follows:

(Southern railway from Monroe to Hillsdale.)

| | | | |
|---|---|---|---|
| Monroe to Ida, | 9 | miles | $0.25 |
| Patersburg, | 18 | " | .50 |
| Adrian, | 35 | " | 1.00 |
| Clayton, | 46 | " | 1.37 |
| Hudson, | 51 | " | 1.50 |
| Hillsdale, | 68 | " | 2.00 |

You will see these average a little less than $0.03.

Names of the members of the sixth board as follows: Thomas W. Wells, A. H. Adams, Robert P. Eldridge.

No. 227.
Sup. Brf. of Maynard for D.
Supreme Court U. S.
FILED
MAR 15 1899
JAMES H. McKENNEY,
Clerk

Filed Mar. 15, 1899.

# Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 227.

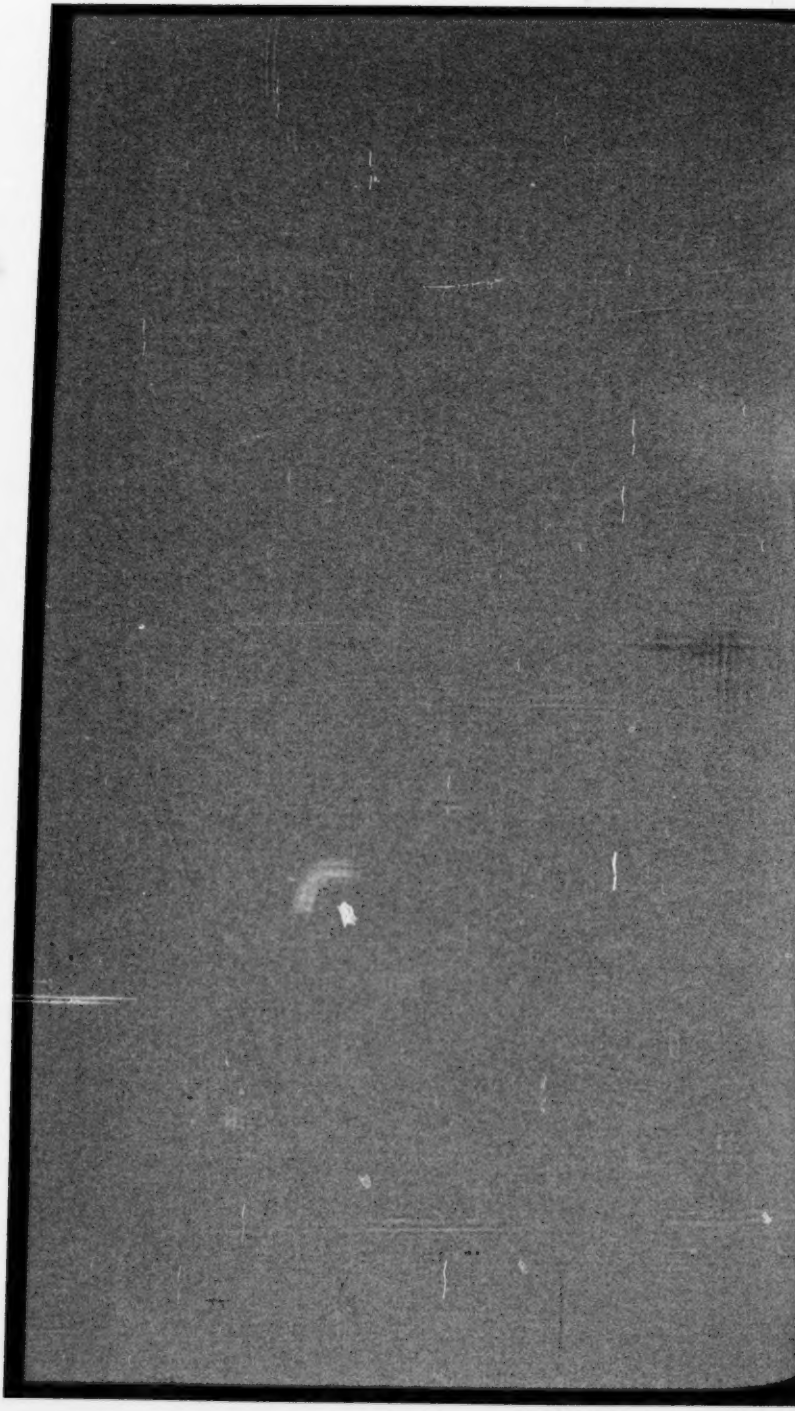
THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY C. SMITH.

**Supplemental Argument of Fred. A. Maynard in Behalf of the Defendant in Error.**

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-13-'99



IN THE

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**OCTOBER TERM, 1898.**

*No. 227.*

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

HENRY C. SMITH.

## Supplemental Argument of Fred. A. Maynard in Behalf of the Defendant in Error.

The single question of law presented in this case is this: The plaintiff in error having *voluntarily* sold mileage tickets good for one thousand miles of travel for one person and for one year, can it be *compelled* by the State of Michigan to issue a precisely similar ticket good upon its lines in said State, not only for the purchaser, but his wife, and for *two* years instead of *one?*

This the plaintiff in error is required to do by a law of the State of Michigan. The plaintiff in error claims that this law is unconstitutional. The law is presumed to be constitutional. Therefore the burden rests upon the plaintiff in error, to show wherein it is unconstitutional, as courts will never declare a statute void unless its invalidity, in their judgment, is placed beyond a reasonable doubt. A reasonable doubt must be solved in favor of the legislative action and the act sustained.

Mr. Greene says in his brief that the act of 1891 in question is in violation of article 1, section 10, of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts; that the State entered into a contract in 1846 with the Michigan Southern Railroad Company, and that the plaintiff in error is the successor of that company, and has acquired and is possessed of all the rights, powers, and privileges to which that company was entitled under such charter and contract, among which was and is the right to charge and receive three cents per mile for transportation of a passenger over said road.

Assuming that the State of Michigan in 1846, through its legislature, had attempted to make such a contract, the first great question of law is this: *Did the legislature of 1846 have the power to contract with the Michigan Southern Railroad Company that it should have the right to fix its own rates or charges for the transportation of passengers, and thereby place it beyond the power of subsequent legislatures to change such rates?*

This is the exact question raised by Chief Justice Waite in *Ruggles vs. Illinois, 108 U. S., 528.* His words are:

> "The only question that need be considered is whether the charter of the Central Military Tract Railroad Company, one of the Illinois corporations, which, through agreements of consolidation, are now represented by the Chicago, Burlington & Quincy Railroad Company, purports on its face to grant to the company the right to fix the rate of fare and freight to be charged for the conveyance of persons and property on its railroad free of all control by the State. If on examination we find that no such grant was intended, it will be unnecessary to decide *whether one legislature has the power to bind succeeding legislatures by a contract to that effect.*"

The question was not decided because the court found that no such grant was intended, and it has never been decided.

My first claim, then, is this: *That the legislature of 1846 did not possess the power to enter into this contract even if the intention to make a contract fixing rates was unmistakable.* In support of this proposition I have many points to urge.

In the first place, this whole question hinges upon this point: Is the fixing of rates and tolls, a *governmental* question, which therefore is not the subject of contract, or is it the subject of contract? If rates and tolls belong to the first class each legislature can deal with the question. If, however, they are the subject of contract, the rate fixed in the charter cannot be disturbed. My position is that the legislature of the State always has the power to fix the rates of

tolls upon the lines of road within its jurisdiction, subject only to the one limitation, that the rate so fixed must be reasonable.

That the State cannot by contract divest itself of this power of controlling and regulating rates; that there is now and always has been a limitation upon legislative power to make such a contract; that the regulation of railroad charges is a part of the police power of the State, and that this power, essential to the safety and the protection of the people of the State, cannot be contracted away; "that in all cases arising under this power there can be no contract, no irrepealable law, because it is a governmental subject involving public interests, and legislative acts concerning them are necessarily *public laws*."

Newton *vs.* Commissioners, 100 U. S., p. 559.

If this proposition is correct, then the whole claims of the respondent relative to its vested rights which it secured under the old charter of 1846 falls to the ground. It is conceded that these limitations upon legislative power exist. These are the words of Chief Justice Fuller in delivering the opinion of the court in New York and New England Railroad Company *vs.* Bristol, 151 U. S., p. 567:

> "It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligations of contracts, or the deprivations of property without due process, or the equal protection of the laws by the

States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. *The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.*" (Citing the familiar cases of Beer Co. *vs.* Massachusetts, 97 U. S., 25; The Fertilizing Co. *vs.* Hyde Park, 97 U. S., 659.)

In other words, that wherever the preservation of the public safety, the public health, the public morals, and the public welfare is concerned an act of one legislature granting in the most positive terms franchises, rights, and privileges may be repealed by a subsequent legislature, and this, notwithstanding the State, through its legislature, may have entered into a most solemn contract, and on the strength of which private parties may have in good faith invested millions of dollars. The great principle is "*Salus populi—suprema lex.*"

This rule of law is settled. Does it apply to rates and tolls? Can the legislature enter into a contract on this subject which will bind subsequent legislatures? We say not. Because it is essential to the public safety that this power of control should be retained by the people; because it is a part of the Police power of the State which cannot be contracted away. It is not the subject of contract. Naming a rate is simply a license given by the State to the company to charge a certain rate until such a time as a subsequent legislature

may determine to change the rates, and it can be changed at any time whenever the public welfare and safety demands it, and lowered from time to time so long as the rate is not unreasonably low; and a railroad company can never complain until it is able to show that the law prevents it receiving a reasonable return upon its investment.

The learned counsel for the plaintiff in error have been unable to find a single case decided by this court, or by any court of last resort in this country, to sustain their position, that the fixing of rates and tolls is a subject of contract, except one case in Mississippi, to which I shall hereafter refer. It is true that there are a number of decisions of this court in which the justice writing the opinion inserts a clause which intimates that such might be the case, but there has been no decision of this court to that effect.

On the contrary, the reasons given in many decisions of this court, in my opinion, sustain my position, that the fixing of rates and tolls is purely a *governmental* question, which is not the subject of absolute contract.

Munn *vs.* Illinois, 94 U. S., 113.

Chicago, Burlington and Quincy Railroad Co. *vs.* Iowa, 94 U. S., 155.

Peik *vs.* Chicago and Northwestern Railway Co., 94 U. S., 164.

Winona and St. Peter Railroad Company *vs.* Blake, 94 U. S., 180.

Ruggles *vs.* Illinois, 108 U. S., 526.

Stone *et al. vs.* Farmers' Loan and Trust Co., 116 U. S., 307.

Wabash, etc., R'y Co. *vs.* Illinois, 118 U. S., 586.

Dow *vs.* Beidelman, 125 U. S., 680.

Georgia Railroad and Banking Company *vs.* Smith, 128 U. S., 174.

Chicago, Milwaukee, etc., R. R. Co. *vs.* Minn., 134 U. S., 418.

Chicago, etc., Railroad Co. *vs.* Wellman, 143 U. S., 339.

Budd *vs.* New York, 143 U. S., 517.

Covington and Cincinnati Bridge Co. *vs.* Kentucky, 154 U. S., 204; see opinion, same case, Kentucky court of appeals, 54 A. and E. Railroad Cases, 466.

Reagan *vs.* Farmers' Loan and Trust Co., 154 U. S., 362.

St. Louis and San Francisco Railway Co. *vs.* Gill, 156 U. S., 549.

Smyth *vs.* Ames, 169 U. S., 466.

"The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public; they are invested with the right of eminent domain only to be exercised for public purposes; therefore, they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression."

Ch. J. Fuller in Bristol case, *supra*, 571.

Under this statement of law, it clearly follows that the power of control over rates must remain with the people, or else the crime of extortion can be practiced by a railroad company under a claim of a vested right so to do, and no power remains in the State to prevent it.

If, in 1846, the rate had been fixed at 10 cents a mile, and the railroad company could now carry the passenger at a profit of 2 cents a mile, it clearly follows that the company would obtain from each passenger the extortionate charge of 8 cents for each mile of travel. What stronger example could be used to show that this legislative control must remain?

> Mr. Justice Harlan in Smyth *vs.* Ames, 169 U. S., 544, Brief, pp. 6 and 7; Mr. Justice Bradley in Wabash, &c., R. R. Co. *vs.* Illinois, 118 U. S., 586, Brief, p. 7; Mr. Justice Brewer in Budd *vs.* New York, 143, p. 517, Brief, pp. 22 and 23.

Notwithstanding these decisions, it is seriously urged that the police power of the State has no application to the case at bar, for the reason that the contract with a railroad company relative to the rates and the tolls to be exacted from passengers has nothing whatever to do with life, public health, public morals, and public safety. Therefore, when such a contract, no matter how unfavorable it may be to the State, is once made, the obligation of said contract is forever protected from legislative impairment by the Constitution of the United

States. My answer to this proposition is found in the words of this court, over and over again repeated, that a railroad is a public highway, created for public purposes, and performs the function of the State; and that when capitalists put their money into the construction of a railroad they know that they are doing *pro tanto* the work of the Government, and they voluntarily submit to the control of the Government, relying upon the good sense of the legislative department, and knowing that they can appeal to the courts when an act has been passed which deprives them of the use of their property. In other words, when they can show that the law deprives them of a reasonable return on their investments. To exact from a passenger more than a reasonable rate is extortion. It is the clear duty of the State to save its citizens from this extortion.

The subject of rates and tolls, being absolutely essential to the welfare of all the people, must always be within and governed by the police power of the State. It is not the subject of contract to the extent that it cannot at any time be changed or modified by a subsequent legislature when it shall appear that the welfare of the people depends upon such a change being made. The rule for which I contend is a recognition of the great principle that this power of legislation is a power of government, continuing in its nature, and therefore the State always within its own jurisdiction, has the power to limit the amount of charges to be exacted by railroad companies. By the police power the State has

the power to regulate the conduct of its citizens one towards another and the manner in which each shall use his own property when such regulation becomes necessary for the public good.

Though the judges of this court may have differed in opinion as to what forms of property are affected by this rule, there is no disagreement, nor never has been, as to the application of it to railroad companies.

Railroad companies are carriers for hire. They are incorporated as such and given extraordinary powers in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interests and subject to legislative control as to their rates of fare and freight. It is settled by the decisions of this court that the legislature, in the exercise of its police power, has the right to fix rates, tolls, and charges for railroad corporations. The police power being absolutely inviolable, it follows that the right and power of the legislature to fix and regulate those rates, tolls, and charges cannot be contracted away.

The same limitations surround and the same necessities demand the application of this portion of the police power as demand the application of any other portion of it, and there is no reason why the fixing of rates, tolls, and charges should constitute an exception to the principle that the police power of the State cannot be bargained away. The rule is that the legislature cannot by any contract divest itself of legislating

at any time upon any subject in which the lives, health, and welfare of the citizens is concerned. That right can no more be bargained away than the power itself. Is there any question that the right and authority to regulate common carriers and the charges to be made and the tolls taken by them has always been exercised by the several States to prevent excessive and exorbitant charges and unjust discriminations? These are matters in which the public is largely and vitally interested. The railroad is a quasi-public corporation, and its charter is granted not merely for the purpose of placing the corporation in the position where it can make money, but the main design is for the public good, and to promote the general welfare of the community, and all its rights of eminent domain, all its franchises as a corporation, are delegated and conferred upon it by the legislature as a trustee for that great purpose. Therefore the power of the legislature to regulate the tolls of a railroad is but a part of the police power of the legislative department of the State government, and the test of that power is whatever is necessary to preserve and protect the rights of one citizen without invading the rights of another. Such power being vested in the legislature, and absolutely necessary for the protection of the people, it cannot be parted with, and on no subject is it more imperatively necessary that the power should be retained in the fixing of rates and tolls.

I claim that the words of Mr. Chief Justice Waite in Stone *vs.* Mississippi, 101 U. S., 817, are applicable to this case:

"ALL AGREE THAT THE LEGISLATURE CANNOT BARGAIN AWAY THE POLICE POWER OF THE STATE.

"Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police. * * *

"No legislature can bargain away the public health, or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental control is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. * * *

"The power of governing is a trust committed by the people to the government, no part of which can be granted away.

"The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights.

"These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must vary with varying circumstances. They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are sub-

ject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality. The contracts which the Constitution protects are those that relate to property rights, not governmental."

Mr. Justice Swain says, in Newton *vs.* Commissioners, *supra*:

"In all governmental subjects there can be no contract—no irrepealable law.

"They involve *public interests*, and legislative acts concerning them are necessarily *public laws*.

"Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil."

It follows that the clause relative to rates and tolls in a railroad charter is not in any sense a contract within the meaning of the Constitution of the United States. It is simply a license, which the State, under its police power and for the protection of the public, may at any time change and reduce the rates, so long as it does not undertake to place them below the standard of reasonableness. The distinction

must be recognized between the *contractual* and *governmental* power of the State.

To wit, that the provisions of the Federal Constitution in reference to contracts only prohibits the States from passing laws impairing the obligation of such contracts *as relate to property rights*, but not to subjects that are purely governmental.

It is by the exercise of this power that this court has determined that the arbitrary power does not exist in the board of directors of a railroad company to fix any rates and tolls that they see fit when the power is given to them in words like these:

> "The directors are hereby authorized to fix such rates as they may deem to be reasonable."

You have set aside these words by writing into the charter the great common-law principle that the rates fixed shall be reasonable. No matter what the words used, they are subject to the law. This law prohibits the legislature from making any contract on the subject which a subsequent legislature cannot change.

SECOND PROPOSITION.

If I have not demonstrated that this power of fixing rates can never be contracted away, I certainly have demonstrated that when it is claimed to have been parted with it must be established by the clearest possible language, and if there is any doubt whatever in regard to the matter the doubt must

be resolved in favor of the State and against the corporation. As Chief Justice Waite said in Ruggles *vs.* Illinois:

> "Grants of immunity from legitimate government control are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established the legislature is free to act on all subjects within its general jurisdiction as the public interests may seem to require."

And in Stone *vs.* Yazoo and Miss. R. R. Co., 62 *Miss.*, 607, the only case in the United States which holds that rates and tolls are the subject of contract, these words are found:

> "It can only be where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of toll that the power of the legislature afterwards to interfere can be denied. It is not to be presumed that the right of legislative control was intended to be renounced. Every presumption is against that. If the grant can be interpreted without ascribing to the legislature an intent to part with any power, it will be done. Only what is plainly parted with is gone."

Such being the rule, we need only to apply this rule to the charter upon which the plaintiff in error relies to say that there is not one single word in the charter which justifies the claim that there has been an abandonment of this governmental power. As in the case of Georgia Banking Company *vs.* Smith, 128 U. S., 180, the charter in this case was framed upon the theory that a railroad was subject, like an ordinary wagon road, to the use of all persons who were able to place

the necessary conveyance upon it, and it was then, in 1846, generally supposed that, while the company constructing the road was the owner of the road-bed, any one could run cars upon it upon payment of the established tolls and following the regulations prescribed for the management of trains. This idea runs through this entire charter. It is an old, antiquated instrument, and upon reading it, it is clearly seen that it applies to conditions which have long since passed away.

It is contended by counsel for the plaintiff in error that the power is given the company absolutely and unqualifiedly to fix rates not exceeding the maximum named. The fact is that no such power was given.

In section 15 these words are found: "Provided said company shall charge no greater sum than was charged or authorized by the State January 1, 1846."

But how much was charged by the State does not appear in this record.

The charter under consideration grew out of a sale of the railroad therein named, built by the State of Michigan. This work was but a part of a scheme for internal improvement which originated in the early history of the State. See act 57, p. 152, and act 97, p. 193, Public Acts of 1837, and act 104, p. 190, Public Acts of 1839, which repeals act 97, which is entitled "An act for the regulation of internal improvements and for the appointment of a board of commissioners." Section 13 of said act reads as follows:

"The Commissioners of internal improvement are hereby authorized and required to establish the rate of tolls, subject, however, to the direction of the legisture, to be paid on all the articles conveyed on any of the canals or railroads now owned or hereafter to be constructed by the State, and to erect all such toll-houses, weighing scales, offices and other edifices, and also to purchase such grounds for the convenience thereof, as they may think necessary for the convenience and profitable use of their canals and railroads; and they are hereby authorized from time to time to make all such rules and regulations, in respect to the collection of tolls and the payment thereof, as they may deem expedient."

In 1840 the legislature of Michigan passed act number 63, p. 91, Public Acts of 1840, entitled "An act for the regulation of internal improvement," which repeals act 104 so far as the same contravenes the provisions of the act. By section 18 of this last act it is made the duty of the collectors on any canal, railroad, or other public work to collect the tolls prescribed by the board from all persons who may travel on the same; and by section 19 said board is authorized and required to establish the rates of tolls to be paid by passengers and on all articles of freight conveyed on or over any canal, railroad, or other public work now or hereafter constructed by the State, *subject, however, to the revision and decision of the legislature.*

See also Sec 20. P. 213 = R.S. of Mich. 1846

Under these laws the State constructed two short lines of road, namely, the Central railroad and the Southern railroad. The State was not successful in running them, and

the legislature of 1846 passed an act, number 42, which authorized the sale of the Central Railroad Company and to incorporate the Michigan Central.

And act number 113, authorizing the sale to the Southern railroad and to incorporate the Michigan Southern Railroad Company. These two acts are in many respects identical; but it will be found that section 15 of the Central charter and section 15 of the Southern charter are entirely different. In section 15 of the Southern charter is found these words:

> "It shall and may be lawful for the said company from time to time to fix, regulate and receive the tolls and charges taken for the transportation of property and persons on said railroad. * * * *Provided*, said company shall charge no greater sum or tolls for the transportation of persons or property than were charged or authorized by the State of Michigan to be taken on the Southern railroad on the first day of January last"—that is, January 1, 1846.

It is simply an assumption that the rate was three cents a mile on the first of January. After a careful examination I have been unable to find any record of the board of internal improvements. In section 5, act number 63, Public Acts of 1840, it is made the duty of the board to keep a complete record of all their proceedings, but this record seems to have been lost; but from section 19 of the said act it appears that the rates of toll fixed by said board were subject to the revision and decision of the legislature.

It follows that there is not a single word in any act of the

legislature of Michigan, or in the charter itself, which justifies the claim which has been persistently made from the beginning, that the State had by contract agreed to permit the railroad company, incorporated in the act of sale, to charge during the life of said charter a fixed rate. On the contrary, by the law which was in existence at the time the incorporators made their investment, they knew that the whole power of regulation rested in the legislature. And yet Mr. Greene, on pages 41, 42, and 43 of his brief, seeks to distinguish this case from Ruggles *vs.* Illinois, 108 U. S., 526. He says on page 42: "There is a material difference between the charter provisions in that case and in the case at bar."

In that case no maximum rate was fixed as in the case at bar. Consequently, it may well be held that the matter was left subject to legislative control, while in this case a maximum is fixed, and therefore power is given the company absolutely and unqualifiedly to fix rates not exceeding said maximum. An examination of the statutes which I have made shows there is no foundation in law for this claim. The proviso in section 15 of the charter of the Southern Company is a limitation upon the power granted in the clause preceding—"to say because a limit is designated it creates a contract is not sanctioned by reason or authority"—54 A. and E. Railroad cases, 469.

The sole object of the insertion of the maximum rate in railroad charters is always to limit the power of the board of directors in fixing rates and tolls and to protect the State and the people of the State from extortion.

A simple permission to railroad companies to charge an amount which the legislature may fix upon as a reasonable amount for the time being. But counsel have sought to use these words as an affirmative grant of power to themselves. *Read from page 31 in my brief.*

> "Only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation, is it possible to deny to a subsequent legislature the right to change those rates?"
>
> "The rule of construction, in this class of cases, is that it shall be most strongly against the corporation. Nothing is to be taken as conceded but what is given in unmistakable terms—or by an implication equally clear. The affirmation must be shown. Silence is negative, and doubt is fatal to the claim."

Where, I ask, is there a single word in this charter which expresses any such intent?

I think that I have demonstrated by a simple reference to the decisions of this court and the reasons therein contained that the fixing of rates and tolls is a governmental question; that it is not the subject of contract, but it is a part of the police power of the State, and that each legislature in turn can take up the question of rates and tolls and examine them with reference to the facts and circumstances then existing, and change them from time to time, as the circumstances may require, subject only to the limitation that they must not fix the rate so low as to prevent the

stockholders from receiving a reasonable return on their investment.

Second. That if this power of control can be contracted away at all it is only where it appears from the charter that the intent so to do is established beyond any reasonable doubt.

Third. That there is nothing whatever in this charter which shows any purpose or intent whatever to give the absolute power of control to the board of directors.

Section 37 of the public charter refers simply to the rights, privileges, and immunities secured to the railroad company in the charter by contract, among them being the right to exist as a corporation, to the exclusive use of its road-bed, the right to issue bonds, the right to acquire property by eminent domain, etc. As was said by Mr. Chief Justice Waite in Stone *vs.* Mississippi—

> "It is not the charter which is protected, but only the contract the charter may contain. If there is no contract, there is nothing in the grant on which the constitution can act."

It follows, then, as a matter of course, if the power to contract with reference to rates and tolls did not exist or was not exercised, section 37 has no reference to them. In the act provision had been made for the State to buy back the road, and this clause was simply inserted in case of any change, modification, or repeal of the charter that the purchasers should be reimbursed for any damages that they can

show they had sustained on those matters which were the *subject of contract and formed a part of the consideration of the sale.* If there be a doubt as to what was the subject of contract it must be resolved in favor of and not against the State. Pages 7 to 21 of Mr. Greene's brief are devoted to his point—that the legislature of Michigan had no constitutional power to require his road to sell a mileage book good for two years, for the reason that the State was thereby depriving the company of the right to manage its own property. Answering this point, Mr. Justice Montgomery, in announcing the opinion of the supreme court of Michigan, says:

> "It may be said that every attempt to fix rates of toll, or rates for the carriage of passengers, to some extent involves an interference with the management and control of the property of a railroad company. It cannot be successfully contended that it would not be competent for the legislature to provide that a ticket furnished to a passenger should be good for a definite reasonable time, and when such legislature is adopted it of necessity deprives the company of the power to make rules inconsistent therewith.
>
> Quoting from Elliott on Railroads:
>
> > 'In some of the States it is provided by statute that tickets shall be good for a certain number of years, notwithstanding any limitation thereon.'
>
> "If such enactment be within the power of the legislature, where is the line to be drawn short of that fixed by the Federal Supreme Court, which is that legislation of this character must not be so unreasonable as to deprive the company of the use of its property."

Attorney General *vs.* Old Colony Railroad Company, 160 Mass., p. 62, also meets this objection. The point was raised by the counsel for the railroad company, but is not regarded as important enough to be seriously considered. The court divided, the majority holding that the legislation was unconstitutional simply because it required one company to do business upon the credit of another. But it is assumed by all the judges that the act requiring the issue of mileage books was reasonable, and that the legislature of a State has the constitutional right to make any reasonable regulation for the benefit of the public in regard to the transaction of any or all of the railroad business in the State which does not conflict with any expressed or clearly implied provisions of the constitution of the State or of the United States.

I have argued in my principal brief that by consolidation with several other companies the old Michigan Southern Railroad Company voluntarily surrendered its charter of 1846, and my associate, Mr. Smith, will discuss the question at length. I respectfully submit that the judgment of the supreme court of Michigan should be affirmed.

FRED. A. MAYNARD,
*Attorney for Defendant in Error.*

# LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY *v.* SMITH.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 227. Argued March 14, 15, 1899. — Decided April 17, 1899.

The provision in the act of the legislature of Michigan, No. 90, of the year 1891, amending the general railroad law, that one thousand-mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State or carrying on business partly within and partly without the limits of the State, at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula; that such one thousand-mile tickets may be made non-transferable, but whenever required by the purchaser they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand-mile ticket shall be forfeited to the railroad company; that each one thousand-mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used, is a violation of that part of the Constitution of the United States which forbids the taking of property without due process of law, and requires the equal protection of the laws.

In so holding the court is not thereby interfering with the power of the legislature over railroads, as corporations or common carriers, to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience or proper protection of the public; but it only says that the particular legislation in review in this

case does not partake of the character of legislation fairly or reasonably necessary to attain any of those objects, and that it does violate the Federal Constitution as above stated.

MAY 21, 1891, by act No. 90 of that year, the general railroad law of the State of Michigan was amended by the legislature, a portion of the ninth section of which amendment reads as follows:

". . . *Provided, further*, That one thousand-mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State or carrying on business partly within and partly without the limits of the State, at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula. Such one thousand-mile tickets may be made non-transferable, but whenever required by the purchaser they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand-mile ticket shall be forfeited to the railroad company. Each one thousand-mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used."

On April 19, 1893, and again on October 17, 1893, the defendant in error demanded of the ticket agent of the plaintiff in error, in the city of Adrian, Michigan, a thousand-mile ticket, pursuant to the provisions of the above section, in the names of himself and his wife Emma Watts Smith, which demand was refused. The defendant in error then applied for a mandamus to the circuit court to compel the railway company to issue such ticket upon the payment of the amount of $20, and after a hearing the motion was granted. Upon certiorari the Supreme Court of Michigan affirmed that order

and held that the statute applied only to the railway lines of the plaintiff in error operated within the State of Michigan.

The defence set up by the railway company was that under the charter from the State to one of the predecessors of the company to whose rights it had succeeded, it had the right to charge three cents a mile for the transportation of all passengers, and that such charter constituted a contract between the State and the company, which the former had no right to impair by any legislative action, and that the statute compelling the company to sell thousand-mile tickets at the rate of two cents a mile was an impairment of the contract, and was therefore void as in violation of the Constitution of the United States. It also alleged that the act was in violation of the Fourteenth Amendment of the Constitution of the United States, in that it deprived the company of its property and liberty of contract without due process of law, and also deprived it of the equal protection of the laws. The act was also alleged to be in violation of the constitution of the State of Michigan on several grounds.

The Supreme Court of the State decided that there was no contract in relation to the rates which the company might charge for the transportation of passengers, and that the statute violated no provision either of the Federal or the state constitution, but was a valid enactment of the legislature, and therefore the court affirmed the order for mandamus, the ticket to be good upon and limited to the railway lines of the defendant railroad company within the State of Michigan. 72 N. W. Rep. 328. The company sued out a writ of error from this court.

*Mr. George C. Greene* for plaintiff in error.

*Mr. Fred A. Maynard* and *Mr. Henry C. Smith* for the defendant in error.

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court.

The only subject of inquiry for us in this case is whether the act of the legislature of the State of Michigan violates any provision of the Federal Constitution. It is not within our province to review the decision of the Supreme Court upon the question whether the act violates the constitution of the State.

The two questions of a Federal nature that are raised in the record are, (1) whether the act violates the Constitution of the United States by impairing the obligation of any contract between the State and the railroad company; and (2) if not, does it nevertheless violate the Fourteenth Amendment of the Constitution by depriving the company of its property or liberty without due process of law or by depriving it of the equal protection of the laws. If we should decide that this act violates any provision of the Fourteenth Amendment it would be unnecessary to examine the question whether there was any contract between the State and the company as claimed by it. We will therefore first come to an investigation of the legislative authority with reference to that Amendment.

If unhampered by contract there is no doubt of the power of the State to provide by legislation for maximum rates of charges for railroad companies, subject to the condition that they must be such as will admit of the carrier earning a compensation that under all the circumstances shall be just to it and to the public, and whether they are or not is a judicial question. If the rates are fixed at an insufficient amount within the meaning of that term as given by the courts, the law would be invalid, as amounting to the taking of the property of the company without due process of law. *Chicago & Grand Trunk Railway Company* v. *Wellman*, 143 U. S. 339, 344; *Reagan* v. *Farmers' Loan & Trust Company*, 154 U. S. 362, 399; *St. Louis & San Francisco Railway Co.* v. *Gill*, 156 U. S. 649; *Smyth* v. *Ames*, 169 U. S. 466, 523.

The extent of the power of the State to legislate regarding the affairs of railroad companies has within the past few years been several times before this court. *Wabash, St. Louis & Pacific Railway Co.* v. *Illinois*, 118 U. S. 557; *Illinois Central*

*Railroad* v. *Illinois*, 163 U. S. 142; *Lake Shore & Michigan Southern Railway* v. *Ohio*, 173 U. S. 285, and cases cited. These cases arose under the commerce clause of the Federal Constitution, the inquiry being whether the legislation in question violated that provision. In the cases in which the legislation was upheld it was on the ground that the State was but exercising its proper authority under its general power to legislate regarding persons and things within its jurisdiction, sometimes described as its police power, and that in exercising that power in the particular cases it did not violate the commerce clause of the Federal Constitution by improperly regulating or interfering with interstate commerce. The extent of the right of the State to legislate was examined in these various cases — so far at least as it was affected by the commerce clause of the Constitution of the United States.

In *Illinois Central Railroad* v. *Illinois*, the state statute imposed the duty upon the company of stopping its fast mail train at the station at Cairo, to do which the train had to leave the through route at a point three miles from that station and then return to the same point in order to resume its journey. This statute was held to be an unconstitutional interference with interstate commerce, and therefore void.

In *Lake Shore & Michigan Southern Railway* v. *Ohio*, a statute of the State of Ohio required the company to stop certain of its trains at stations containing 3000 inhabitants for a time sufficient to receive and let off passengers, and the statute was held to be a valid exercise of legislative power and not an improper interference with interstate commerce. In the course of the opinion of the court, which was delivered by Mr. Justice Harlan, it was said that "the power, whether called police, governmental or legislative, exists in each State, by appropriate enactments not forbidden by its own constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the States is entirely distinct from any power granted to the General Government, although when exercised it may sometimes

reach subjects over which national legislation can be constitutionally extended." And again, speaking of cases involving state regulations more or less affecting interstate or foreign commerce, it was said that these cases "were sustained upon the ground that they were not directed against nor were direct burdens upon interstate or foreign commerce; and having been enacted only to protect the public safety, the public health or the public morals, and having a real, substantial relation to the public ends intended to be accomplished thereby, were not to be deemed absolutely forbidden because of the mere grant of power to Congress to regulate interstate and foreign commerce, but to be regarded as only incidentally affecting such commerce and valid until superseded by legislation of Congress on the same subject."

The police power is a general term used to express the particular right of a government which is inherent in every sovereignty. As stated by Mr. Chief Justice Taney, in the course of his opinion in the *License cases*, 5 How. 504, 583, in describing the powers of a State: "they are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion."

This power must, however, be exercised in subordination to the provisions of the Federal Constitution. If, in the assumed exercise of its police power, the legislature of a State directly and plainly violates a provision of the Constitution of the United States, such legislation would be void.

The validity of this act is rested by the counsel for the defendant in error upon the proposition that the state legislature has the power of regulation over the corporation created by it, and in cases of railroad corporations, the same power of regulation and also full control over the subject of rates to be charged by them as carriers for the transportation of persons

and property. Assuming that the State is not controlled by contract between itself and the railroad company, the question is how far does the authority of the legislature extend in a case where it has the power of regulation, and also the right to amend, alter or repeal the charter of a company, together with a general power to legislate upon the subject of rates and charges of all carriers. It has no right even under such circumstances to take away or destroy the property or annul the contracts of a railroad company with third persons. *Greenwood* v. *Freight Company*, 105 U. S. 13, 17; *Commonwealth* v. *Essex County*, 13 Gray, 239; *People* v. *O'Brien*, 111 N. Y. 1, 52; *Detroit* v. *Detroit & Howland Plankroad*, 43 Michigan, 140.

A railroad company, although a *quasi* public corporation, and although it operates a public highway, *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641; *Lake Shore &c. Railway* v. *Ohio*, 173 U. S. 285, 301, has nevertheless rights which the legislature cannot take away without a violation of the Federal Constitution, as stated in *Smyth* v. *Ames*, 169 U. S. 466, 544. A corporation is a person within the protection of the Fourteenth Amendment. *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26; *Smyth* v. *Ames*, 169 U. S. 466, 522, 526. Although it is under governmental control, that control must be exercised with due regard to constitutional guarantees for the protection of its property.

The question is presented in this case whether the legislature of a State, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, with the limitations above stated, and having power to alter, amend or repeal their charters, within certain limitations, has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law.

It is said that the power to create this exception is included in the greater power to fix rates generally; that having the right to establish maximum rates, it therefore has power to

lower those rates in certain cases and in favor of certain individuals, while maintaining them or permitting them to be maintained at a higher rate in all other cases. It is asserted also that this is only a proper and reasonable regulation.

It does not seem to us that this claim is well founded. We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates — a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. And it assumes to regulate the time in which the tickets purchased shall be valid and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law. We speak of the general right of the company to conduct and manage its own affairs; but at the same time it is to be understood that the company is subject to the unquestioned jurisdiction of the legislature in the exercise of its power to

provide for the safety, the health and the convenience of the public, and to prevent improper exactions or extortionate charges from being made by the company.

It is stated upon the part of the defendant in error that the act is a mere regulation of the public business, which the legislature has a right to regulate, and its apparent object is to promote the convenience of persons having occasion to travel on railroads and to reduce for them the cost of transportation; that its benefit to the public who are compelled to patronize railroads is unquestioned; that it brings the reduction of rates of two cents per mile within the reach of all persons who may have occasion to make only infrequent trips; and that there is no reason why the legislature may not fix the period of time within which the holder of the ticket shall be compelled to use it. The reduction of rates in favor of those purchasing this kind of ticket is thus justified by the reasons stated.

The right to claim from the company transportation at reduced rates by purchasing a certain amount of tickets is classed as a convenience. As so defined it would be more convenient if the right could be claimed without any compensation whatever. But such a right is not a convenience at all within the meaning of the term as used in relation to the subject of furnishing conveniences to the public. And also the convenience which the legislature is to protect is not the convenience of a small portion only of the persons who may travel on the road, while refusing such alleged convenience to all others, nor is the right to obtain tickets for less than the general and otherwise lawful rate to be properly described as a convenience. If that were true, the granting of the right to some portion of the public to ride free on all trains and at all times might be so described. What is covered by the word "convenience," it might be difficult to define for all cases, but we think it does not cover this case. An opportunity to purchase a thousand-mile ticket for less than the standard rate we think is improperly described as a convenience.

The power of the legislature to enact general laws regard-

ing a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation. We do not deny the right of the legislature to make all proper rules and regulations for the general conduct of the affairs of the company, relating to the running of trains, the keeping of ticket offices open and providing for the proper accommodation of the public.

This act is not like one establishing certain hours in the day during which trains shall be run for a less charge than during the other hours. In such case it is the establishing of maximum rates of fare for the whole public during those hours, and it is not a discrimination in favor of certain persons by which they can obtain lower rates by purchasing a certain number of tickets by reason of which the company is compelled to carry them at the reduced rate, and thus, in substance, to part with its property at a less sum than it would be otherwise entitled to charge. The power to compel the company to carry persons under the circumstances as provided for in this act, for less than the usual rates, does not seem to be based upon any reason which has hitherto been regarded as sufficient to authorize an interference with the corporation, although a common carrier and a railroad.

The act also compels the company to carry not only those who choose to purchase these tickets, but their wives and children, and it makes the tickets good for two years from the time of the purchase. If the legislature can, under the guise of regulation, provide that these tickets shall be good for two years, why can it not provide that they shall be good for five or ten or even a longer term of years? It may be said that the regulation must provide for a reasonable term. But what is reasonable under these circumstances? Upon what basis is the reasonable character of the period to be judged? If two years would and five years would not be reasonable, why not? And if five years would be reasonable, why would not ten? If the power exist at all, what are the

factors which make it unreasonable to say that the tickets shall be valid for five or for ten years? It may be said that circumstances can change within that time. That is true, but circumstances may change within two just as well as within five or ten years. There is no particular time in regard to which it may be said in advance and as a legal conclusion that circumstances will not change. And can the validity of the regulation be made to depend upon what may happen in the future, during the running of the time in which the legislature has decreed the company shall carry the purchaser of the ticket? Regulations for maximum rates for present transportation of persons or property bear no resemblance to those which assume to provide for the purchase of tickets in quantities at a lower than the general rate, and to provide that they shall be good for years to come. This is not fixing maximum rates, nor is it proper regulation. It is an illegal and unjustifiable interference with the rights of the company.

If this power exist it must include the right of the legislature, after establishing maximum freight rates, to also direct the company to charge less for carrying freight where the party offering it sends a certain amount, and to carry it at that rate for the next two or five or ten years. Is that an exercise of the power to establish maximum freight rates? Is it a valid exercise of the power to regulate the affairs of a corporation? The legislature would thus permit not only discrimination in favor of the larger freighter as against the smaller one, but it would compel it. If the general power exist, then the legislature can direct the company to charge smaller rates for clergymen or doctors, for lawyers or farmers or school teachers, for excursions, for church conventions, political conventions, or for all or any of the various bodies that might desire to ride at any particular time or to any particular place.

If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law;

but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the legislature cannot thus interfere with the conduct of the affairs of corporations.

But it may be said that as the legislature would have the power to reduce the maximum charges for all, to the same rate at which it provides for the purchase of the thousand-mile ticket, the company cannot be harmed or its property taken without due process of law when the legislature only reduces the rates in favor of a few instead of in favor of all. It does not appear that the legislature would have any right to make such an alteration. To do so might involve a reduction of rates to a point insufficient for the earning of the amount of remuneration to which a company is legally entitled under the decisions of this court. In that case reduction would be illegal. For the purpose of upholding this discriminatory legislation we are not to assume that the exercise of the power of the legislature to make in this instance a reduction of rates as to all would be legal, and therefore a partial reduction must be also legal. *Prima facie*, the maximum rates as fixed by the legislature are reasonable. This of course applies to rates actually fixed by that body.

There is no presumption, however, that certain named rates which it is said the legislature might fix but which it has not, would, in case it did so fix them, be reasonable and valid. That it has not so fixed them affords a presumption that they would be invalid, and that presumption would remain until the legislature actually enacted the reduction. At any rate, there is no foundation for a presumption of validity in case it did so enact, in order to base the argument that a partial

reduction, by means of this discrimination, is therefore also valid. And this argument also loses sight of the distinction we made above between the two cases of a general establishment of maximum rates and the enactment of discriminatory, exceptional and partial legislation upon the subject of the sale of tickets to individuals willing and able to purchase a quantity at any one time. The latter is not an exercise of the power to establish maximum rates.

True it is that the railroad company exercises a public franchise and that its occupation is of a public nature, and the public therefore has a certain interest in and rights connected with the property, as was held in *Munn* v. *Illinois*, 94 U. S. 113, 125, and the other kindred cases. The legislature has the power to secure to the public the services of the corporation for reasonable compensation, so that the public shall be exempted from unreasonable exactions, and it has also the authority to pass such laws as shall tend to secure the safety, convenience, comfort and health of its patrons and of the public with regard to the railroad. But in all this we find it neither necessary nor appropriate, in order that the legislature may exercise its full right over these corporations, to make such a regulation as this, which discriminates against it and in favor of certain individuals, without any reasonable basis therefor, and which is not the fixing of maximum rates or the exercise of any such power.

The legislature having fixed a maximum rate at what must be presumed, *prima facie*, to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike, that no discrimination against it in favor of certain classes of married men or families, excursionists or others, shall be made by the legislature. If otherwise, then the company is compelled at the caprice or whim of the legislature to make such exceptions as it may think proper and to carry the excepted persons at less than the usual and legal rates, and thus to part in their favor with its property without that compensation to which it is entitled from all others, and therefore to part with its property without due process of law. The affairs of the company are

in this way taken out of its own management, not by any general law applicable to all, but by a discrimination made by law to which the company is made subject. Whether an act of this nature shall be passed or not, is not a matter of policy to be decided by the legislature. It is a matter of right of the company to carry on and manage its concerns subject to the general law applicable to all, which the legislature may enact in the legal exercise of its power to legislate in regard to persons and things within its jurisdiction.

This case differs from that which has just been decided, *Lake Shore &c. Company* v. *Ohio*, 173 U. S. 285. In that case the convenience of the public in the State was the basis of the decision, regard being also had to the convenience of the public outside of and beyond the State. It included all the public who desired to ride from the stations provided for in the act, and the convenience to the people in taking a train at these stations was held by this court to be so substantial as to justify the enactment in question.

But in this case it is not a question of convenience at all within the proper meaning of that term. Aside from the rate at which the ticket may be purchased, the convenience of purchasing this kind of a ticket is so small that the right to enact the law cannot be founded upon it. It is no answer to the objection to this legislation to say that the company has voluntarily sold thousand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company.

To say that the legislature has power to absolutely repeal

the charter of the company and thus to terminate its legal existence does not answer the objection that this particular exercise of legislative power is neither necessary nor appropriate to carry into execution any valid power of the State over the conduct of the business of its creature. To terminate the charter and thus end the legal life of the company does not take away its property, but, on the contrary, leaves it all to the shareholders of the company after the payment of its debts.

In *Attorney General* v. *Old Colony Railroad*, 160 Mass. 62, the statute required every railroad corporation in the Commonwealth to have on sale certain tickets which should be received for fare on all railroad lines in the Commonwealth, etc., and the statute was held invalid. The precise question involved in this case was not there presented, and the court said it was not necessary or practicable to attempt to determine in that case just how far the legislature could go by way of regulating the business of railroad companies or just where were the limits of its power.

The power to enact legislation of this character cannot be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to alter, amend or repeal the charter thereof. The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation or indirectly by other means. The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers or others exercising a calling and using their property in a manner in which the public have an interest.

In this case there is not an exercise of the power to fix maximum rates. There is not the exercise of the acknowledged power to legislate so as to prevent extortion or unreasonable or illegal exactions. The fixing of the maximum rate does that. It is a pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time. It is not legislation for the

safety, health or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who in the legislative judgment should be carried at a less expense than the other members of the community. There is no reasonable ground upon which the legislation can be rested unless the simple decision of the legislature should be held to constitute such reason. Whether the legislature might not in the fair exercise of its power of regulation provide that ordinary tickets purchased from the company should be good for a certain reasonable time, is not a question which is now before us, and we need not express any opinion in regard to it.

In holding this legislation a violation of that part of the Constitution of the United States which forbids the taking of property without due process of law, and requires the equal protection of the laws, we are not, as we have stated, thereby interfering with the power of the legislature over railroads as corporations or common carriers, to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience or proper protection of the public. We say this particular piece of legislation does not partake of the character of legislation fairly or reasonably necessary to attain any of those objects, and that it does violate the Federal Constitution as above stated.

*The judgment of the Supreme Court of the State of Michigan should be reversed and the case remanded for further proceedings not inconsistent with the opinion of this court, and it is so ordered.*

The Chief Justice and Mr. Justice Gray and Mr. Justice McKenna dissented.